No. 17-586 **Vide 17-626**	
Title:	**Greg Abbott, Governor of Texas, et al., Appellants** **v.** **Shannon Perez, et al.**
Docketed:	October 19, 2017
Linked with 17A825	
Lower Ct:	United States District Court for the Western District of Texas
Case Numbers:	(SA-11-CV-360)
Decision Date:	August 15, 2017
Questions Presented	

DATE	**PROCEEDINGS AND ORDERS**
Oct 17 2017	Statement as to jurisdiction filed. (Response due November 20, 2017)
Oct 17 2017	Appendix of Greg Abbott, Governor of Texas, et al. filed.
Nov 20 2017	Motion to dismiss or affirm and supplemental appendix filed by appellees Eddie Rodriguez, et al. **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	Brief amici curiae of States of Louisiana, Alabama, Michigan, Missouri, Ohio, South Carolina, and Wisconsin filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 04 2017	Reply of appellants Greg Abbott, Governor of Texas, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 20 2017	DISTRIBUTED for Conference of 1/5/2018.
Jan 08 2018	DISTRIBUTED for Conference of 1/12/2018.
Jan 12 2018	Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits. Further consideration of the question of jurisdiction in No. 17-626 is postponed to the hearing of the case on the merits. The cases are consolidated and a total of one hour is allotted for oral argument.

Jan 12 2018	Because the Court has consolidated these cases for briefing and oral argument, future filings and activity in the cases will now be reflected on the docket of No. 17-586. Subsequent filings in these cases must therefore be submitted through the electronic filing system in No. 17-586. Each document submitted in connection with one or more of these cases must include on its cover the case number and caption for each case in which the filing is intended to be submitted. Where a filing is submitted in fewer than all of the cases, the docket entry will reflect the case number(s) in which the flings is submitted; a document filed in all of the consolidated cases will be noted as "VIDED."
Jan 30 2018	Joint motion for divided argument and enlargement of time for oral argument filed by appellees. VIDED **Main Document** **Proof of Service**
Jan 31 2018	Joint Blanket Consent filed by appellees, Shannon Perez, et al., and appellees, Mexican American Legislative Caucus, filed. VIDED **Blanket Consent**
Feb 01 2018	Blanket Consent filed by appellants, Greg Abbott, Governor of Texas, et al. VIDED **Blanket Consent**
Feb 02 2018	Application (17A825) for leave to file appellants' brief on the merits and the reply brief on the merits in excess of the word limits, submitted to Justice Alito. VIDED **Main Document** **Proof of Service**
Feb 06 2018	Application (17A825) granted by Justice Alito for leave to file appellants' brief on the merits and the reply brief on the merits in excess of the word limits. VIDED
Feb 23 2018	SET FOR ARGUMENT on Tuesday, April 24, 2018. VIDED
Feb 26 2018	Brief of appellants Greg Abbott, Governor of Texas, et al. filed. VIDED. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 26 2018	Brief of appellee United States in support of appellants filed. VIDED. **Proof of Service** **Main Document**
Feb 26 2018	Joint appendix filed. VIDED **Main Document** **Proof of Service**
Mar 05 2018	Brief amici curiae of States of Louisiana, Alabama, Michigan, Missouri, Ohio, South Carolina, and Wisconsin filed. VIDED. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 07 2018	CIRCULATED
Mar 23 2018	Motion for divided argument filed by appellee United States. VIDED.

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RECORD AND BRIEFS

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No.

In the Supreme Court of the United States

GREG ABBOTT, ET AL, APPELLANTS,

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the district court issued an appealable interlocutory injunction when it invalidated Texas' duly enacted redistricting plan and ordered the parties to appear at a remedial hearing to redraw state congressional districts unless the Governor called a special legislative session to redraw the congressional map within three days.

2. Whether the Texas Legislature acted with an unlawful purpose when it enacted a redistricting plan originally imposed by the district court to remedy any potential constitutional and statutory defects in a prior legislative plan that was repealed without ever having taken effect.

3. Whether the Texas Legislature engaged in intentional vote dilution when it adopted Congressional District 27 in 2013 after the district court found, in 2012, that CD27 did not support a plausible claim of racially discriminatory purpose and did not dilute Hispanic voting strength because it was not possible to create an additional Hispanic opportunity district in the region.

4. Whether the Legislature engaged in racial gerrymandering in Congressional District 35 when it simply adopted the district unchanged as part of the court-ordered remedial plan.

PARTIES TO THE PROCEEDING

Plaintiffs in the district court are Shannon Perez, Gregory Tamez, Nancy Hall, Dorothy DeBose, Carmen Rodriguez, Sergio Salinas, Rudolfo Ortiz, Lyman King, Armando Cortez, Socorro Ramos, Gregorio Benito Palomino, Florinda Chavez, Cynthia Valadez, Cesar Eduardo Yevenes, Sergio Coronado, Gilberto Torres, Renato De Los Santos, Jamaal R. Smith, Debbie Allen, Sandra Puente, Kathleen Maria Shaw, TJ Carson, Jessica Farrar, Richard Nguyen Le, Wanda F. Roberts, Mary K. Brown, Dottie Jones, Mexican American Legislative Caucus - Texas House of Representatives (MALC), Texas Latino Redistricting Task Force, Joey Cardenas, Alex Jimenez, Emelda Menendez, Tomacita Olivares, Jose Olivares, Alejandro Ortiz, Rebecca Ortiz, Margarita V Quesada, Romeo Munoz, Marc Veasey, Jane Hamilton, John Jenkins, Eddie Rodriguez, City of Austin, Constable Bruce Elfant, Travis County, David Gonzalez, Milton Gerard Washington, Alex Serna, Sandra Serna, Betty F. Lopez, Beatrice Saloma, Joey Martinez, Lionor Sorola-Pohlman, Balakumar Pandian, Nina Jo Baker, Juanita Valdez-Cox, Eliza Alvarado, the League of United Latin American Citizens (LULAC), Henry Cuellar, Texas State Conference of NAACP Branches, Howard Jefferson, Bill Lawson, Eddie Bernice Johnson, Sheila Jackson-Lee, Alexander Green, United States of America, Rod Ponton, Pete Gallego, Filemon Vela, Jr., Gabriel Y. Rosales, Belen Robles, Ray Velarde, Johnny Villastrigo, Bertha Urteaga, Baldomero Garza, Marcelo H. Tafoya, Raul Villaronga, Asenet T. Armadillo, Elvira Rios, Patricia Mancha, and Juan Ivett Wallace.

Defendants in the district court are Greg Abbott, in his official capacity as Governor of Texas, Rolando Pablos, in his official capacity as Texas Secretary of State, the State of Texas, Steve Munisteri, in his official capacity as Chair of the Texas Republican Party, Boyd Richie, Gilberto Hinojosa, in his official capacity as Chair of the Texas Democratic Party, and Sarah M. Davis.

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In the Supreme Court of the United States

No. _____

GREG ABBOTT, ET AL, APPELLANTS,

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

Five years ago, this Court ordered the three-judge district court in this case "to draw interim maps" for the State of Texas' 2012 congressional elections "that do not violate the Constitution or the Voting Rights Act." *Perry v. Perez*, 565 U.S. 388, 396 (2012) (per curiam). The district court followed this Court's command when it formulated remedial maps and ordered the State to conduct its 2012 congressional elections under a court-ordered remedial plan known as Plan C235. As the district court explained in a detailed opinion in 2012, Plan C235 addressed all of the statutory or constitutional deficiencies that had been identified in the Texas Legislature's initial 2011 map.

While Texas could have continued to pursue the litigation necessary to employ its duly enacted 2011 maps in subsequent elections, the State opted for a more conciliatory approach in an attempt to end this litigation: it accepted the district court's decision and adopted the court-ordered remedial plan as its own. In 2013, the

Texas Legislature repealed the 2011 congressional plan and enacted the court-ordered Plan C235 into law. The 2011 plan therefore never took legal effect: it was formally repealed before it was ever used to conduct a single election. Subsequent elections would be held under a remedial map adopted by the court and now bearing the imprimatur of the Legislature.

The plaintiffs amended their complaints to assert claims against the newly enacted Plan C235, but instead of moving on to pursue their claims against Plan C235—the only live plan, and the only map that had actually been used in a congressional election—the district court allowed the plaintiffs to continue pursuing their moot claims against the repealed 2011 congressional plan. The district court spent nearly four years adjudicating claims against the defunct and never-employed 2011 plan, finally issuing a decision in March 2017. While the court was adjudicating claims against the long-dead 2011 plan, Texas held two more elections under Plan C235.

Now, five years and three election cycles after *ordering* Texas to use Plan C235, that very same court has held that the Legislature engaged in intentional discrimination and racial gerrymandering when it enacted legislation adopting the court-ordered remedial plan as its own. The district court did not actually find that the 2013 Legislature deliberately enacted Plan C235 to harm minority voters or that it actually relied on race to sort voters into different districts. Nor could it. Instead, the district court faulted the Legislature for failing to remove the discriminatory "taint" from the 2011 plan, even though the district court's own order implementing Plan

C235 explained that the district court itself had already done exactly that, as instructed by this Court.

This Court has already stayed the district court's order pending appeal. *Abbott v. Perez*, No. 17A225, 2017 WL 4014835 (Sept. 12, 2017). The Court's plenary review is warranted to reverse the district court's novel constitutional-for-the-courts-but-not-for-the-Legislature theory, which is plainly wrong, but at a minimum presents substantial questions for this Court's review.

OPINION BELOW

Appellants appeal the three-judge district court's Order on Plan C235, *Perez v. Abbott*, No. 5:11-cv-360, 2017 WL 3495922 (W.D. Tex. Aug. 15, 2017), J.S. App. 3a-119a. That order incorporated the district court's prior findings of fact and order on the 2011 map. *Id.* at 14a n.13.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1253. *See infra* Part I. Appellants filed their notice of appeal on August 18, 2017, J.S. App. 1a-2a. The Court has jurisdiction to consider claims regarding the currently operative Plan C235, but claims against the repealed 2011 map are moot.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Fourteenth Amendment and §2 of the Voting Rights Act (VRA), 52 U.S.C. §10301. The relevant provisions are reproduced in the appendix to this petition. *See* J.S. App. 426a-428a.

STATEMENT

A. In 2011, the Texas Legislature enacted reapportionment plans for Texas state legislative and congressional districts. Before the Legislature even enacted these redistricting plans, however, the plaintiffs filed this lawsuit raising claims against the State under the Constitution and VRA §2, and the Chief Judge of the Fifth Circuit constituted a three-judge district court under 28 U.S.C. §2284.

VRA §5 prevented the 2011 plans from taking legal effect until they were precleared. *See* 52 U.S.C. §10304. Texas filed suit in the United States District Court for the District of Columbia seeking preclearance. Unless and until preclearance was granted, claims against the 2011 plans under the Constitution and VRA §2 remained unripe, leaving the district court here without subject-matter jurisdiction to rule on the merits. The 2011 plans were never precleared.

B. While the preclearance lawsuit was pending, the Texas three-judge district court here conducted a two-week trial beginning on September 6, 2011, regarding the constitutional and VRA §2 claims against the 2011 maps. Because a final judgment in the preclearance litigation seemed unlikely to come in time for the 2012 election cycle, the district court ordered the parties to submit proposed interim plans for the 2012 elections.

In November 2011, by a 2-1 vote with Judge Smith dissenting, the district court ordered the 2012 congressional elections to be conducted under a court-ordered plan (C220). Concluding that it "was not required to give

any deference to the Legislature's enacted plan," the district court announced that it had drawn an "independent map" based on "neutral principles that advance the interest of the collective public good." *Perez*, 565 U.S. at 396.

Texas moved to stay that interim plan pending appeal. On December 9, 2011, this Court granted the State's motion to stay, noted probable jurisdiction, issued an expedited briefing schedule, and set oral argument for January 9, 2012. *Perry v. Perez*, 565 U.S. 1090 (2011) (mem.).

On January 20, 2012, the Court vacated the district court's order in a unanimous opinion. *Perez*, 565 U.S. at 399. The Court held that "the District Court exceeded its mission to draw interim maps that do not violate the Constitution or the Voting Rights Act, and substituted its own concept of 'the collective public good' for the Texas Legislature's determination of which policies serve 'the interests of the citizens of Texas.'" *Id.* at 396.

This Court emphasized that the district court's mission was remedial, not a freewheeling mandate to pursue the collective good, and gave the court specific instructions—six separate times—to implement plans that complied with the Constitution and the VRA:

- "'[F]aced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying' a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting

Rights Act.'" *Id.* at 393 (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)).

- "[T]he state plan serves as a starting point for the district court. It provides important guidance that helps ensure that the district court appropriately confines itself to drawing interim maps that comply with the Constitution and the Voting Rights Act, without displacing legitimate state policy judgments with the court's own preferences." *Id.* at 394.
- "A district court making such use of a State's plan must, of course, take care not to incorporate into the interim plan any legal defects in the state plan." *Id.* (citing *Abrams*, 521 U.S. at 85-86; *White v. Weiser*, 412 U.S. 783, 797 (1973)).
- "[A] district court should still be guided by [the State's] plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits." *Id.*
- The district court should "take guidance from the lawful policies incorporated in such a[n unprecleared] plan." *Id.* at 395.
- The district court's "mission [is] to draw interim maps that do not violate the Constitution or the Voting Rights Act." *Id.* at 396.

C. On remand, the district court adopted and imposed Plan C235 as an interim remedial plan for the congressional redistricting. J.S. App. 367a-423a. Plan C235 reconfigured nine challenged districts from the Legisla-

ture's 2011 plan. But Plan C235 retained without reconfiguration CD27, a district around Corpus Christi, and CD35, a district between Austin and San Antonio. J.S. App. 408a, 419a.

In a 56-page opinion, the district court concluded that Plan C235 "sufficiently resolves the 'not insubstantial' § 5 claims and that no § 2 or Fourteenth Amendment claims preclude its acceptance under a preliminary injunction standard." *Id.* at 396a. The court provided six pages of analysis explaining why CD27 did not intentionally dilute minority voting strength, and another seven pages explaining why CD35 was not a racial gerrymander. *See id.* at 408a-415a, 417a-423a.

D. After the D.C. district court denied preclearance to the 2011 plans, *see Texas v. United States*, 883 F. Supp. 2d 133 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013) (mem.), the State appealed that ruling to this Court. The Texas district court denied a motion by the plaintiffs to modify the court-ordered remedial plan based on the D.C. court's preclearance decision. This Court then denied an application from some plaintiffs to stay Plan C235. *LULAC v. Perry*, 133 S. Ct. 96 (2012) (mem.). The State's 2012 congressional elections were conducted under the district-court-ordered remedial plan.

E. While the State's appeal in the preclearance case was pending, the Texas Attorney General encouraged the Legislature to adopt the district-court-ordered remedial Plan C235 as the State's permanent reapportionment plan. J.S. App. 429a, 431a. On May 27, 2013, the Governor called the Legislature into a special session

"[t]o consider legislation which ratifies and adopts the interim redistricting plans ordered by the federal district court as the permanent plans for districts used to elect members of the Texas House of Representatives, Texas Senate and United States House of Representatives." Proclamation by the Governor, No. 41-3324 (May 27, 2013).

The 2013 Legislature formally repealed the 2011 redistricting plans and adopted verbatim the court-ordered Plan C235 on June 24, 2013. The next day, this Court held VRA §4(b)'s coverage formula unconstitutional, so it could "no longer be used as a basis for subjecting jurisdictions to preclearance." *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013). One day later, the Texas Governor signed into law the bill adopting Plan C235.[1]

F. After the Legislature repealed the 2011 plans, the State moved to dismiss the claims against those plans as moot. J.S. App. 10a. The district court summarily denied the motion without even awaiting a response from the plaintiffs. *Id.* at 11a. The district court then granted the plaintiffs leave to amend their complaints to assert claims against the plans enacted in 2013. But the court also allowed the plaintiffs to continue challenging the repealed 2011 plans, permitting the plaintiffs to amend their pending claims to seek preclearance bail-in under VRA §3—once again rejecting the State's argument that

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[1] This Court vacated the judgment in the preclearance lawsuit and remanded for further proceedings in light of *Shelby County* and the suggestion of mootness by certain appellees. *Texas v. United States*, 133 S. Ct. 2885 (2013) (mem.).

claims against the repealed 2011 plans were moot. *Id.* The district court also granted a motion to intervene by the United States, which did not assert any claims against Plan C235. *Id.* at 13a. After extensive additional discovery, the district court held a second trial on claims against the repealed Plan C185 in August 2014. *Id.*

G. More than two years later, on March 10, 2017, the district court held by a 2-1 vote that the claims against the repealed 2011 plans were not moot. J.S. App. 122a. The majority then found various violations, including intentional vote dilution in CD27 and racial gerrymandering in CD35. *Id.* at 161a-194a.

Judge Smith dissented, finding these claims moot because the 2011 maps had been repealed and were never in effect. *Id.* at 336a-349a. Judge Smith's reasoning had already been adopted by the Fifth Circuit in a related case involving the State's 2011 redistricting plan for the Texas Senate. *See Davis v. Abbott*, 781 F.3d 207, 220 (5th Cir.), *cert. denied*, 136 S. Ct. 534 (2015) (holding that Texas "repealed the 2011 plan and adopted the district court's interim plan in its place, thus mooting Plaintiffs' lawsuit" and depriving the district court of jurisdiction to vacate its preliminary injunction). Judge Smith also would have upheld CD27 and CD35. J.S. App. 350a.

H. Although the State had repeatedly told the district court that its congressional districts must be set by October 1, 2017, to avoid disruption of deadlines for the November 2018 elections, trial on the operative 2013 congressional map (*i.e.*, Plan C235) did not begin until July 2017. *Id.* at 14a.

On August 15, 2017, the district court issued a divided decision invalidating Plan C235. *Id.* at 14a n.13, 118a. Notwithstanding the fact that the court itself had ordered the State to use Plan C235 five years earlier, and notwithstanding that this plan was adopted by the 2013 Legislature with a different purpose than the 2011 Legislature (resolving the ongoing dispute about the State's congressional districts by embracing the court's remedial plan as its own), the court invalidated CD27 and CD35. It concluded that the State engaged in intentional vote dilution because the remedial plan preserved CD27 in the same form as the 2011 map, and engaged in racial gerrymandering because the remedial plan preserved CD35. *Id.* at 117a-118a.

The court then gave the Governor 72 hours to either order a special session of the Legislature or consult with the State's experts, prepare remedial map proposals, and appear at a hearing on September 5, 2017, to redraw Texas' congressional districts on an expedited basis. *Id.* at 118a-119a.

Texas filed a notice of appeal of the district court's August 15 order on Plan C235. *Id.* at 1a-2a. After the district court denied Texas' stay motion, Justice Alito, acting as Circuit Justice for the Fifth Circuit, entered a temporary stay and requested a response from the plaintiffs. *Abbott v. Perez*, No. 17A225, 2017 WL 3695678 (Aug. 28, 2017) (Alito, J., in chambers). This Court granted a stay "pending the timely filing and disposition of an appeal to this court" on September 12, 2017. *Perez*, 2017 WL 4014835.

THE COURT SHOULD NOTE PROBABLE JURISDICTION OR SUMMARILY REVERSE

According to the district court, the Texas Legislature engaged in intentional discrimination by enacting into law a congressional districting map that the district court itself had ordered the State to use. That bears repeating: the court concluded that the Legislature engaged in *intentional* discrimination by enacting *the court's own remedial map*. That remarkable decision defies law, logic, and fact. Even accepting the court's fundamentally flawed premise that a Legislature must "cleanse" past legislation of the "taint" of a previous Legislature's "discriminatory intent" before adopting it, the Legislature plainly did not act with unlawful purpose when it took the district court at its word that the court's own remedial map did indeed remedy the potential constitutional and VRA violations that the court identified. What was a valid remedy when embraced by the three-judge court does not somehow become intentionally discriminatory when embraced by the State Legislature. The district court's contrary conclusion eviscerates the presumption of good faith to which legislative enactments are entitled, destroys the distinction between discriminatory intent and discriminatory effect, and eliminates what little breathing room legislatures have left to draw districts that comply with the many competing demands that federal and state law impose.

I. This Court Has Jurisdiction to Review the District Court's Order.

This Court has jurisdiction to review the three-judge district court's order because it constitutes an interlocutory injunction, and federal law authorizes a direct appeal to this Court. 28 U.S.C. §1253. The Court has "no discretion to refuse adjudication of the case on its merits" when an appeal is properly brought under §1253. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014).

While the district court did not label its order an "injunction," this Court has made clear that appellate jurisdiction turns on the "practical effect" of the lower court's order, not its form or use of magic words. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981) (interpreting 28 U.S.C. §1292(a)). Interpreting *Carson*, lower courts have consistently held that "[e]ven if an order does not by its terms grant or deny a specific request for an injunction . . . the order may still be appealable if it has the 'practical effect' of doing so." *Salazar ex rel. Salazar v. Dist. of Columbia*, 671 F.3d 1258, 1261-62 (D.C. Cir. 2012); *see also, e.g.*, *Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.*, 756 F.3d 380, 384 (5th Cir. 2014); *Etuk v. Slattery*, 936 F.2d 1433, 1440 (2d Cir. 1991).

That is precisely the case here, as the district court's order has the "practical effect" of preventing the State from conducting congressional elections under its duly enacted redistricting plan. The district court held that the "Plan C235 configurations of CD35 and Nueces County/CD27 violate § 2 and the Fourteenth Amendment," J.S. App. 118a, that the violations "*must* be remedied," *id.* (emphasis added), and that if the Legislature

does not redraw the districts, the district court will, *id.* Indeed, the district court gave the Governor a mere 72 hours to decide whether to call the Legislature into special session to draw new maps. And in the event the Governor declined to accede to that demand (and decline, he did), the court ordered the parties to consult with mapdrawing experts, confer on the possibility of agreeing to a remedial plan, and come prepared to offer proposed remedial plans at a hearing to redraw Texas' congressional map on September 5, 2017. *Id.* at 118a-119a. Simply put, there can be no serious dispute that the district court's order enjoins Texas from conducting future congressional elections under Plan C235.

To be sure, the deadlines set by the district court have come and gone without a redrawn map, but that is only because this Court stayed the order. The district court undoubtedly would promptly reschedule the hearing to redraw the map were the stay lifted. In fact, after Justice Alito granted a temporary stay, the district court issued an "advisory" encouraging the parties to continue preparing for its remedial mapdrawing on a "voluntary" basis. *Id.* at 425a. The order thus alters the status quo and disrupts the State's election procedures by forbidding Texas from using C235 in future elections.

The district court's claim that it "has not enjoined [Plan C235's] use for any upcoming elections," Order, *Perez v. Abbott*, No. 5:11-cv-360 (W.D. Tex. Aug. 18, 2017) (ordering the parties "to proceed with preparations for the remedial hearing as previously directed"), is no bar to this Court's jurisdiction. No matter how the

district court labels its order, it is an injunction in substance. If the order were not intended to block the State from using Plan C235—and to do so immediately—there would have been no reason to put the Governor under a 72-hour deadline or to order the parties to rush to redraw maps a mere 21 days after declaring CD27 and CD35 invalid. After all, this Court's precedent requires "afford[ing] a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (principal op.). The district court's August 15, 2017 order therefore has the practical effect of an injunction blocking Plan C235.

The order satisfies all other aspects of appealability analysis. It "affect[s] predominantly all of the merits," *Salazar*, 671 F.3d at 1262, and alters the status quo, *see Calderon v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 137 F.3d 1420, 1422 n.2 (9th Cir. 1998); *Cohen v. Bd. of Trs. of the Univ. of Med. & Dentistry of N.J.*, 867 F.2d 1455, 1466 (3d Cir. 1989) (en banc). It is certain to have a "serious, perhaps irreparable, consequence," *Carson*, 450 U.S. at 84, because it invalidates two congressional districts and compels the State to redraw the congressional map. And the order can be "'effectually challenged' only by immediate appeal," *id.*, because appellate review from a final judgment after the imposition of remedial maps would come too late to prevent the irreparable harm of being forced to use a new court-ordered map for the 2018 elections. The practical effect of the district court's order therefore establishes this Court's jurisdiction.

II. The Legislature Did Not Act With An Unlawful Purpose When It Adopted the Court-Drawn Map As Its Own.

The district court invalidated Texas' congressional map on the theory that the Legislature engaged in intentional discrimination when it enacted as its own the same remedial redistricting plan that the district court itself ordered the State to use in 2012. The court reasoned that the Legislature failed to remove the "taint" of discrimination that supposedly lingered from the 2011 plan that the district court's remedial plan replaced—even though that is precisely what the remedial plan was supposed to accomplish under this Court's mandate in *Perry v. Perez*. That extraordinary holding is wrong at every turn.

A. The District Court Applied a Fundamentally Flawed Legal Test and Reached a Fundamentally Flawed Conclusion.

To prevail on either an intentional-vote-dilution claim (as they did on CD27) or racial-gerrymandering claim (as they did on CD35), the plaintiffs had a significant burden of proof. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (intentional vote dilution); *Miller*, 515 U.S. at 916 (racial gerrymandering). This Court decades ago established the legal standard of discriminatory intent for intentional-vote-dilution claims:

> "Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at

> least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). Unless and until the plaintiffs proved that the 2013 Legislature acted with a racially discriminatory purpose, Defendants had no burden to prove anything. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)). Similarly, a racial-gerrymandering claim requires the plaintiffs to prove "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916.

The district court did not ask whether the plaintiffs proved that the Legislature acted for the purpose of harming minority voters because of their race when it enacted Plan C235. Nor did the court ask whether the plaintiffs proved that the Legislature had a racially predominant motive when it enacted Plan C235. Instead, the district court framed the question as whether *the State* affirmatively proved that the Legislature "removed" the "taint of discriminatory intent" that purportedly infected Plan C235—even though Plan C235 was not drawn by the Legislature, but was imposed *by the court itself*. J.S. App. 46a. Setting aside the problem that there is not and never was any "taint" for the Legislature to remove, *see infra* Part III, that reversal of burdens of proof—and even chronology—is flawed in every respect.

At the outset, requiring States to affirmatively prove that the Legislature removed the "taint" of an earlier

Legislature's "discriminatory intent" cannot be reconciled with "the presumption of good faith that must be accorded legislative enactments," or with the courts' duty to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). That presumption of good faith means that the *plaintiffs* bear the burden of proving unlawful intent, and that any doubt must be resolved in favor of the Legislature. *Id.* The presumption carries particular weight in the context of redistricting legislation because "reapportionment is primarily the duty and responsibility of the State," *Chapman v. Meier*, 420 U.S. 1, 27 (1975), and "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915. That presumption does not cease to exist just because a *different* Legislature purportedly acted with discriminatory intent when enacting a law designed to address the same matter.

Moreover, the notion that Legislatures must "cleanse" legislation of past "discriminatory intent" makes no sense. To be sure, impermissible discriminatory *effect* may be carried over (whether intentionally or unwittingly) from one version of a law to another. But discriminatory *intent* is not forever ingrained in a statute; it is a *motive* question that turns on *why* the Legislature enacted the law—a question that may have a different answer depending on which Legislature enacted it. Accordingly, while a Legislature may be required to eliminate any vestiges of impermissible discriminatory

effect that resulted from an earlier Legislature's discriminatory intent, to ask them to "cleanse" otherwise-lawful legislation of an unlawful "intent" is nonsensical, as a law does not contain intent independent from the Legislature's reasons for enacting it.

What the district court really seemed to be saying is that the Legislature must affirmatively change the *substance* of any law that includes features that were previously included in a law enacted with impermissible intent. In other words, the district court effectively imposed a rule that a State can *never* enact provisions that were once included in a different law enacted for discriminatory purposes—even if the provisions have no discriminatory effect and the State's motives are now pure. That result would be at considerable odds with the skepticism this Court has expressed "of a claim that seeks to invalidate a statute based on a legislature's unlawful motive but does so without reference to the content of the legislation enacted." *LULAC v. Perry*, 548 U.S. 399, 422 (2006).

But in all events, while the district court's analysis would be flawed in any context, it cannot possibly justify invaliding Plan C235, because that plan was not enacted by some earlier Legislature with a forbidden intent, but rather was *imposed by the district court itself*. To be sure, Plan C235 carried over some of the same lines as the plan originally enacted by the 2011 Legislature. But that is only because the district court concluded that those lines likely violated neither the Constitution nor the VRA. Indeed, the whole point of ordering Texas to use the court-endorsed remedial Plan C235 in the 2012

elections was to ensure that Texas would be using a plan that was "cleanse[d]" of any "discriminatory intent or legal defect," J.S. App. 40a, that the 2011 plan might have contained. That "cleansing" was precisely what the remedial plan was supposed to accomplish under this Court's mandate "to draw interim maps that do not violate the Constitution or the Voting Rights Act." *Perez*, 565 U.S. at 396.

And that "cleansing" is exactly what the district court *said* Plan C235 accomplished when the court *ordered* Texas to use it in its 2012 elections: the court affirmatively concluded that "C235 is not purposefully discriminatory," and that "C235 adequately addresses Plaintiffs' § 2 claims." J.S. App. 408a, 423a. The 2013 Legislature cannot plausibly be faulted for failing to "cleanse" Plan C235 of the lingering "taint" of the 2011 Legislature's purportedly discriminatory intent when the court itself concluded that it had done just that in drawing and imposing Plan C235.

The district court's only explanation for its bizarre conclusion that *the court* could impose Plan C235 without engaging in intentional discrimination, but *the Legislature* could not do the same, was that the court's 2012 remedial decision was not a *definitive* resolution of potential challenges to the districts in Plan C235. But that, once again, confuses discriminatory intent and discriminatory effect. While the court's 2012 decision certainly did not insulate Plan C235 from future challenge on the ground that the court unwittingly imposed a plan that had impermissible *effects*, the relevant question under the *intent* test is not whether the plan actually suffered

from statutory or constitutional defects, but whether the 2013 Legislature adopted the plan for the *purpose* of discriminating on the basis of race. Plainly, it did not.

Indeed, the Legislature could not have been clearer about its motivation for enacting Plan C235: it believed that embracing as its own a map that came with the imprimatur of a federal court acting under a mandate "to draw interim maps that do not violate the Constitution or the Voting Rights Act," *Perez*, 565 U.S. at 396, was its best chance at bringing this litigation to a close and ensuring that its plan would comply with the Constitution and the VRA. And the Legislature acted well within the bounds of good faith in reaching that conclusion, as it is hard to imagine more persuasive evidence that a map complies with the Constitution and the VRA than a district court order explicitly finding that the map likely does.

Moreover, the record before the district court reinforced that conclusion. The court imposed Plan C235 only after receiving extensive evidence over several weeks, including from the plaintiffs in this case, confirming that the plan remedied any potential concerns. For instance, MALDEF, an organization representing multiple plaintiffs, provided written testimony to the 2013 House Select Committee and Senate Select Committee that explained exactly how Plan C235 fixed every element of the 2011 plan that raised statutory or constitutional concerns.[2] *See* J.S. App. 436a. The 2013 Legisla-

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[2] MALDEF informed the committee that Plan C235 addressed the D.C. court's concern about intentional discrimination in

ture could hardly ask for better legal advice about pending redistricting legislation. The record thus confirms that the simplest and most straightforward conclusion about the 2013 Legislature's purpose is the correct one: the Legislature adopted Plan C235 in an effort to enact a permanent congressional plan that complied with the VRA and the Constitution.

B. The District Court's Intentional Discrimination Finding Defies Law, Logic, and Fact.

The district court resisted that conclusion, instead spinning a convoluted story in which the 2013 Legislature adopted the court-ordered map because it secretly knew that the map had *not* actually "cleansed" the "taint" with which the 2011 Legislature purportedly infected it, and sought to deprive the court of the ability to cure that defect in the future. Tellingly, the only "evidence" the court identified for that dubious conclusion was its view that Defendants were arguing that the Legislature's mere decision to adopt the remedial map as its own "insulated" both that map and the 2011 map "from

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CD23 by restoring it to benchmark performance levels. J.S. App. 437a. In Dallas-Fort Worth, Plan C235 remedied claims of intentional discrimination by curing "the fracturing of minority voters in DFW." *Id.* Plan C235 addressed claims of intentional discrimination in districts represented by African-American and Latino incumbents by ensuring that incumbents' homes and district offices were located in their districts. *Id.* at 438a. Finally, MALDEF explained that Plan C235 addressed retrogression by restoring CD23's performance and creating CD33, as a result of which "[t]he court's interim plan contains 12 minority ability to elect districts." *Id.*

review." J.S. App. 45a. That is a gross mischaracterization of Defendants' position. Defendants have never argued that the mere adoption of Plan C235 "insulates" it from all judicial review. They have argued only that the plaintiffs' unlawful *purpose* accusations fail on the merits because Plan C235 was enacted to try to cure potential defects in the 2011 plan, not to purposefully discriminate.

As for the 2011 plan, the repeal of that plan should indeed have "insulated" it from judicial review, *see infra* Part II.B, but there is nothing remotely unusual, let alone nefarious, about that. That is just a consequence of ordinary mootness principles, under which (absent unusual circumstances not present here, like actions capable of repetition yet evading review) the repeal of a law moots challenges to it. Far from suggesting any impermissible purpose, repealing a law that has met with legal challenges deemed "not insubstantial" by a federal court is a conciliatory measure that should be encouraged. Moreover, the district court can hardly claim that the decision to *repeal* the 2011 plan was evidence of intentional discrimination when the court found that the initial decision to *defend* that plan was evidence of intentional discrimination too. *See* J.S. App. 41a (faulting the State because it "did not accept [the §5 court's rulings] and instead appealed to the Supreme Court"). After all, there must have been *something* the Legislature could do with the 2011 map that the district court would not label intentional discrimination.

Of course, under the district court's misguided analysis, the Legislature really was condemned either way.

Indeed, it is quite telling that the district court never explained how the 2013 Legislature could have "cleansed" the 2011 plan of the "taint of discriminatory intent" that the district court perceived. Instead, the court faulted the Legislature for failing to "engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." J.S. App. 40a. The suggestion that the Legislature had a duty to engage in an unspecified "deliberative process"—as opposed to moving quickly to adopt the remedial plan as its own and move on to other legislative priorities—is itself mistaken. *See Bush v. Vera*, 517 U.S. 952, 966 (1996) (plurality op.) (the Constitution does not "require States engaged in redistricting to compile a comprehensive administrative record"); *accord id.* at 1026 (Stevens, J., dissenting).

But in all events, the 2013 Legislature *did* engage in a deliberative process—and one that "cured" any relevant "taint" in the most definitive of ways: it repealed the 2011 plan entirely, and replaced it with the district court's remedial plan. That plan, which made extensive substantive changes to the 2011 plan, resulted from a protracted deliberative process in court involving multiple groups of plaintiffs with weeks of district-court proceedings, and from this Court's intervening decision in *Perry v. Perez*, which instructed the district court to draw remedial maps "that do not violate the Constitution or the Voting Rights Act." *Perry*, 565 U.S. at 396. If repealing a purportedly discriminatory law and replacing it with a law that has received the imprimatur of a federal court does not suffice to remove any lingering "taint," then it is difficult to imagine what could.

The district court's discriminatory purpose analysis thus provides no clue as to what the State could have done to eliminate the supposed taint from its congressional districts. The 2013 Legislature repealed the 2011 plans; it replaced them with court-ordered plans that substantially reconfigured nine congressional districts challenged by the plaintiffs, as well as several adjacent districts. Yet under the district court's standard, the Legislature's decision to accede to the remedial map and move on only provided further evidence of discriminatory intent. The only path that the district court even suggests might plausibly "cure" the "taint" is confession of error, which implies that a subsequent legislature can *never* remove taint by substantially amending a statute—even if that law does not actually have a discriminatory effect. *See* J.S. App. 41a (citing failure to prove "a change of heart concerning the validity of any of Plaintiffs' claims"). That cannot possibly be the law, and it would raise significant constitutional concerns if it were.

At bottom, the Legislature's decision to embrace the district court's remedial map was exactly what it purported to be: an effort to comply with the Constitution and the VRA and bring protracted litigation to an end. The 2013 Legislature had a keen sense of the costs of continuing litigation and a seemingly obvious mechanism to ensure that future congressional elections would be conducted under lawful districts. Rather than continuing the litigation over the 2011 maps, the Legislature accepted the court-ordered Plan C235 as to both the lines that changed and the lines that the court did not find a basis to change. That action, particularly when viewed

through the lens of the presumption of good faith and validity, is conciliatory, not unconstitutional. The district court concluded otherwise only by ignoring the presumption of good faith, imposing an impossible-to-satisfy remove-the-taint rule, and holding the Legislature to an even higher standard when drawing maps than the court itself.

III. Plan C235 Is Not and Never Was Infected By Any Discriminatory "Taint."

Even setting aside the more fundamental problems with the district court's remove-the-taint rule, the court's order must be reversed for the simple reason that Plan C235 is not and never was infected by any discriminatory "taint." The district court concluded otherwise only by adjudicating moot challenges to a repealed plan and embracing findings with no support in law or fact.

A. The District Court's "Taint" Finding Is Grounded in an Impermissible Advisory Opinion.

At the outset, the district court's conclusion that Plan C235 was infected with lingering "taint" in need of "cleansing" rests entirely on an advisory opinion that the court had no authority to enter. The district court's "taint" theory is based on its March 2017 opinion adjudicating challenges to the 2011 map (Plan C185). But the court never should have been adjudicating those claims in the first place because the 2011 map was *repealed* four years earlier, when the Legislature replaced it with Plan C235. Any challenges to that now-repealed plan thus

were mooted years ago. *See Davis*, 781 F.3d at 220 (holding that the 2013 Texas Legislature's repeal of the 2011 Senate plan mooted claims against the plan).

Indeed, the 2011 plan never affected *any* voter because it was never precleared, never took legal effect, and was never used in an election. *See, e.g.*, *Connor v. Waller*, 421 U.S. 656, 656 (1975) (per curiam) (holding that challenged acts "are not now and will not be effective as laws until and unless cleared pursuant to § 5"); *Branch v. Smith*, 538 U.S. 254, 283-84 (2003) (Kennedy, J., concurring). The Legislature repealed the 2011 plan before it took effect and before the district court entered final judgment on the merits—indeed, before the district court even had jurisdiction to rule on the merits of claims against Plan C185. *See, e.g.*, *Waller*, 421 U.S. at 656 (holding, where laws had not been precleared, that the district court "erred in deciding the constitutional challenges to the Acts based upon claims of racial discrimination"), *quoted in Branch*, 538 U.S. at 283 (Kennedy, J., concurring) ("Where state reapportionment enactments have not been precleared in accordance with § 5, the district court 'err[s] in deciding the constitutional challenges' to these acts."). Accordingly, when the 2013 Legislature enacted Plan C235 and repealed Plan C185, Defendants moved to dismiss all claims against the 2011 plan for lack of subject-matter jurisdiction, and they have continued to argue throughout this litigation that any opinion on the merits of those claims is an impermissible advisory opinion that the district court lacked jurisdiction to enter.

The district court refused to dismiss the plaintiffs' claims against the 2011 plan as moot. As is clear, however, that refusal had nothing to do with the 2011 plan and everything to do with the 2013 plan. In the district court's view, the plaintiffs had been harmed not by Plan C185 itself, but because "mapdrawers [in 2011] acted with an impermissible intent to dilute minority voting strength or otherwise violated the Fourteenth Amendment," and "Defendants were continuing to engage in exactly such conduct *when they adopted the interim plans in 2013*." J.S. App. 125a. In other words, the district court adjudicated moot challenges to the 2011 plan for the acknowledged purpose not of remedying any injury caused by *that* plan (there was none), but merely as a means of laying the groundwork to find purported "taint" for the 2013 Legislature to cure. That was clear legal error. The court could not adjudicate moot challenges to a plan that no longer existed just to lay the predicate for adjudicating different claims entirely.

That the plaintiffs were seeking the remedy of VRA §3(c) preclearance "bail-in" does not change the analysis. Bail-in is a remedy, not a claim. As this Court has made clear, the right to a remedy does not arise until after the plaintiff prevails on a claim, and thus cannot substitute for an Article III *injury*. In *Vermont Agency*, the Court held that "an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000). There, the Court rejected the notion that a *qui tam* rela-

tor's interest in recovering a monetary reward can provide Article III standing, explaining that it is not related to any concrete injury-in-fact. To provide standing, "[t]he interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right." *Id.* at 772. A *qui tam* relator's potential bounty cannot provide standing because it does not remedy an invasion of his personal legal rights—"the 'right' he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails." *Id.* at 772-73.

The same goes for a voting-rights plaintiff's interest in seeing a State bailed into preclearance under §3(c). To seek bail-in, the plaintiff must first prevail on the merits of a constitutional claim for which that remedy is sought. Accordingly, a plaintiff may seek bail-in as a remedy only for a claim that satisfies Article III's case-or-controversy requirement. *See, e.g., Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 175-78 (2011). Here, the threat of injury from the 2011 redistricting plan disappeared when the Legislature repealed it. The plaintiffs' request that the district court reimpose preclearance on the State under §3(c) thus could not keep their moot challenges to the repealed 2011 plan alive, and the district court's opinion adjudicating those moot claims is an impermissible advisory opinion that cannot serve as the predicate for adjudicating claims against a different plan adopted by the district court and then enacted by the 2013 Legislature.

B. There Is Not and Never Was Any Vote Dilution in CD27.

Even assuming the district court had jurisdiction to adjudicate the plaintiffs' moot challenges to the 2011 map, and even assuming the 2013 Legislature could be charged with discriminatory intent for failure to "cure" purported "taint" carried over into Plan C235 from the 2011 map, there is not and never was any unlawful vote dilution in CD27.

Intentional vote dilution requires proof of both discriminatory intent and vote-dilutive effect. *Shaw*, 509 U.S. at 641 (explaining that redistricting plans "violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength"). This Court has long defined vote-dilutive effect as "the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of [the minority group's] choice." *LULAC*, 548 U.S. at 430 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994)). The Court has thus held that VRA §2 cannot require a minority opportunity district unless the minority population in that potential district would make up a 50% majority. *Bartlett v. Strickland*, 556 U.S. 1, 19 (2009). Accordingly, if there is not a compact minority population that would make up at least 50% of the hypothetical additional district, then there is no vote-dilutive *effect*, and thus no vote dilution—intentional or otherwise.

In six years of litigation, the plaintiffs have never been able to draw a proposed congressional plan that

would create more than seven reasonably compact Hispanic opportunity districts in South and West Texas, which is exactly what Plan C235 creates. *See* J.S. App. 127a-131a (finding that the plaintiffs "fail[ed] to demonstrate that an additional compact Latino opportunity district could be drawn in South/West Texas"). Accordingly, the district court itself found that Plan C235 did *not* dilute Hispanic voting strength in the region as a whole. The district court also recognized that CD27 in particular does "not diminish Hispanic voter opportunity for § 2 effects purposes," because relocating "Nueces County Hispanics" to another South Texas district would not lead to the creation of an additional Hispanic opportunity district. *Id.* at 113a. But that recognition should have led the court to the conclusion that the Hispanic population in Nueces County is not sufficiently numerous to satisfy the first prerequisite for a vote-dilution claim under *Thornburg v. Gingles*, 478 U.S. 30 (1986). *See* J.S. App. 114a & n.86. Without that showing, "there neither has been a wrong nor can be a remedy." *Bartlett*, 556 U.S. at 15 (quoting *Growe v. Emison*, 507 U.S. 25, 41 (1993)). Without proof of actual vote-dilutive effect, there is no basis to find vote dilution in CD27.

Even if there were evidence that CD27 had a vote-dilutive *effect*, moreover, there was *no* evidence of *intentional* vote dilution. The district court inferred that Nueces County Hispanic voters "were intentionally deprived of their opportunity to elect candidates of their choice" from the mere fact that the 2011 Legislature knew that CD27 would no longer be a Hispanic opportunity district. J.S. App. 112a; *see also id.* at 191a. But

this awareness does not imply that any legislator, let alone the Legislature as a body, intentionally targeted Hispanic voters in Nueces County on account of their race.[3] *See Feeney*, 442 U.S. at 279 ("'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences.") (citation and footnote omitted).

As this Court has admonished repeatedly, "the legislature always is aware of race." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quoting *Shaw*, 509 U.S. at 646). That alone is not enough to prove intentional discrimination. If it were, States would be required to lock-in and retain all previously existing minority opportunity districts—a requirement found nowhere in the Constitution or VRA §2.[4] The district court's finding of intentional vote dilution in CD27 therefore cannot be reconciled with this Court's precedents.

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[3] The Legislature's purported failure to "substantially address the § 2 violation" that the district court found in 2017, J.S. App. 112a-113a, cannot make up for that deficit because the Legislature in 2013 was obviously unaware of that 2017 ruling when it enacted Plan C235. To the contrary, the only thing the legislature had before it was the district court's 2012 decision finding that CD27 was *not* discriminatory in purpose or effect, which at minimum provided a good-faith basis for the Legislature to believe that CD27 satisfied the VRA and the Constitution. *Id.* at 421a-422a.

[4] VRA §5's defunct retrogression standard could come closer to imposing something analogous to, but still short of, that rigid requirement. Even then, the D.C. district court hearing the VRA §5 claims here found no problem with CD27. 887 F.

C. CD35 Is Not A Racial Gerrymander.

The district court's ruling that CD35 is the product of racial gerrymandering is equally flawed. To prevail on a *Shaw* racial-gerrymandering claim, the plaintiff must prove that race was "the 'predominant factor' motivating the legislature's districting decision." *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999). So "race for its own sake" must be "the overriding reason" for the decision to adopt a particular district, *Bethune-Hill*, 137 S. Ct. at 799, meaning that "the legislature 'subordinated' other factors . . . to 'racial considerations,'" *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (quoting *Miller*, 515 U.S. at 916). If race is proven to be the predominant motive, strict scrutiny applies. *Cooper*, 137 S. Ct. at 1464. The State satisfies strict scrutiny if it had a "strong basis in evidence" to believe that the VRA required it to draw an additional minority opportunity district. *Id.* "[T]he requisite strong basis in evidence exists when the legislature has '*good reasons* to believe' it must use race in order to satisfy the Voting Rights Act." *Bethune-Hill*, 137 S. Ct. at 801 (quoting *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015)).

The first problem with the plaintiffs' racial gerrymandering claim is that the district court affirmatively found that "the 2013 Legislature did not draw the challenged districts in Plan C235." J.S. App. 34a. That bears repeating: The 2013 Legislature did not adjust any district lines or determine which voters to place "within or

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Supp. 2d at 153 (explaining how the creation of CD34 offset changes to CD27).

without a particular district." *Miller*, 515 U.S. at 916; *see* J.S. App. 115a-116a ("There is no evidence that the Legislature again considered in 2013 which persons to include within CD35 . . . ."). Rather, the 2013 Legislature adopted wholesale the map imposed in 2012 by the district court (Plan C235). So the 2013 Legislature could not have "used race as a basis for separating voters into districts" because it did not make any "decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 911.

Moreover, even assuming *arguendo* that race predominated back when *the 2011 Legislature* drew CD35, the 2013 Legislature's decision to enact a court-ordered plan that retained CD35 would readily survive strict-scrutiny review. The district court acknowledged that the Legislature had good reasons to create a new district along the corridor between Austin and San Antonio, where CD35 is located. J.S. App. 408a (finding it "undisputed that much of Texas's overall population growth occurred in Bexar County and Travis County and areas along the I-35 corridor").[5] And the 2013 Legislature had the best possible basis in evidence to believe that it

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[5] CD35 is nothing like the District 25 that the Court invalidated in *LULAC*, 548 U.S. 399. District 25 was "a long, narrow strip that winds its way from McAllen and the Mexican-border towns in the south to Austin, in the center of the State and 300 miles away," and "[t]he Latino communities at the opposite ends of District 25 have divergent 'needs and interests.'" *Id.* at 424. CD35 connects Austin to San Antonio, less than 80 miles away, and is entirely within the growth corridor of Central Texas.

needed to readopt CD35 as a minority opportunity district: the district court's 2012 opinion explained that Plan C235 addressed the plaintiffs' claim that VRA §2 required "7 Latino opportunity districts in South/Central/West Texas" by creating seven such districts—one of which was CD35. J.S. App. 423a.

The district court nevertheless found that CD35 was racially gerrymandered, reasoning that because there is not racial bloc voting in Travis County, and because CD35 covers part of Travis County, VRA §2 could never justify drawing CD35 as an opportunity district encompassing any part of Travis County. *Id.* at 175a.[6] Setting aside the problem that the district court should have asked whether the *entire* territory covered by CD35 *as drawn*—and not a specific county, part of which is not in the district at issue—had racial bloc voting, *see Bethune-Hill*, 137 S. Ct. at 800 ("The ultimate object of the inquiry . . . is . . . the district as a whole."), this "hindsight" analysis ignores the governing legal standard. Strict scrutiny does not require a showing that the Legislature *had* to draw a minority opportunity district to satisfy the VRA.

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[6] The district court noted that a portion of CD35 covered some territory in Travis County around Austin that had been in the former CD25, a crossover district. But the district court did not hold that CD35 was invalid, under a vote-dilution theory, because the Legislature eliminated a preexisting crossover district. *See* J.S. App. 111a. Nor could it have, as the Travis County Hispanic population in the previous crossover district was placed in CD35, a new Hispanic opportunity district, so this population could not possibly have suffered vote dilution.

Instead, it is enough that the Legislature had "good reasons" to believe it was necessary to do so.

Here, the Legislature had the best reason in the world to believe that it needed to draw CD35 as a minority opportunity district to comply with the VRA: the district court told the Legislature as much in 2012. If the district court had "good reasons" to believe that CD35 needed to be drawn as a minority opportunity district, then surely the Legislature did as well. Indeed, the whole point of the strong-basis-in-evidence standard is to "give[] States 'breathing room' to adopt reasonable compliance measures that may prove, *in perfect hindsight, not to have been needed.*" *Cooper*, 137 S. Ct. at 1464 (quoting *Bethune-Hill*, 137 S. Ct. at 802) (emphasis added). If a Legislature cannot even maintain a minority opportunity district when a district court has instructed that doing so is necessary to remedy a potential §2 violation, then the strict-scrutiny standard provides no breathing room at all.

CONCLUSION

The Court should note probable jurisdiction or in the alternative summarily reverse.

Respectfully submitted.

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No. 17-

In the Supreme Court of the United States

GREG ABBOTT, ET AL, APPELLANTS,

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

SHANNON PEREZ, *et al.*, *Plaintiffs*, v. STATE OF TEXAS, *et al.*, *Defendants*.	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]

DEFENDANTS' NOTICE OF APPEAL

Defendants the State of Texas, Greg Abbott, in his official capacity as Governor, and Rolando B. Pablos, in his official capacity as Secretary of State, hereby provide notice of their appeal to the Supreme Court of the United States of this Court's Order on Plan C235 (Aug. 15, 2017), ECF No. 1535.

The appeal is pursuant to 28 U.S.C. § 1253, which authorizes direct appeals to the Supreme Court of the United States from a three-judge district court's interlocutory injunctive orders. The Court's August 15, 2017 Order contains an injunction preventing the State from using the existing Congressional Districts 27 and 35. *See* ECF No. 1535 at 105 ("In Part VI, the Court concludes that the Plan C235 configurations of CD35 and Nueces County/CD27 violate § 2 and the Fourteenth Amendment. These statutory and constitutional violations must be remedied by either the Texas Legislature or this Court.").

Additionally, an interlocutory order that is not expressly labeled as injunctive but nonetheless has the "practical effect" of granting an injunction may be

appealed as an injunctive order. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981). This Order also satisfies *Carson's* "practical effect" test because it prevents the State from using the existing Congressional Districts 27 and 35.

Date: August 18, 2017

Respectfully submitted.

/s/ Patrick K. Sweeten

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APPENDIX B

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-CV-360
	§	
GREG ABBOTT, ET AL.	§	

ORDER ON PLAN C235

Before Circuit Judge SMITH, Chief District Judge GARCIA, and District Judge RODRIGUEZ

This Order addresses Plaintiffs' statutory and constitutional claims against Plan C235, enacted by the 83rd Texas Legislature in 2013.

The following Plaintiffs assert claims against Plan C235 in this consolidated case: the Mexican American Legislative Caucus ("MALC"),[1] the NAACP Plaintiffs,[2]

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[1] MALC is a non-profit Latino legislative caucus established to serve the members of the Texas House of Representatives and their staffs in matters of interest to the Mexican American community of Texas. Docket no. 897 ¶ 18. MALC-1 is a list of current MALC members.

[2] The NAACP Plaintiffs include the Texas State Conference of NAACP Branches, an association of local chapters of the NAACP, Howard Jefferson, and Rev. Bill Lawson. Individual Plaintiff Juanita Wallace passed away in 2016. According to the affidavit of Carmen Watkins, Regional Director for Region VI of the National NAACP, the Texas NAACP has well over 10,000 members and members who are registered to vote in almost every county. NAACP-1. She further

the African-American Congresspersons Plaintiffs,[3] the League of United Latin American Citizens ("LULAC") Plaintiffs,[4] the Rodriguez Plaintiffs,[5] the Quesada

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attests that "the NAACP has at least one branch in each of the implicated counties," 884 members in Tarrant County, 320 members in Bell County, 1,232 members in Harris County, and 147 members in Fort Bend County. *Id.* She further states that she reviewed the official membership lists in each of those counties and determined that there are members who reside in CD9, CD18, CD30, CD33, and House districts 100, 109, 110, and 111 (Dallas County), 95 and 101 (Tarrant County), 54 and 55 (Bell County), and 26 and 27 (Fort Bend County). *Id.*

[3] Eddie Bernice Johnson (CD30), Sheila Jackson Lee (CD18), and Alexander Green (CD9).

[4] The LULAC Plaintiffs include LULAC and individual members Gabriel Rosales, Belen Robles, Ray Velarde, Johnny Villastrigo, Bertha Urteaga, Baldomero Garza, Marcelo H. Tafoya, Raul Villaronga, Asenet T. Armadillo, Elvira Rios, and Patricia Mancha. LULAC has members who are registered to vote in most counties in Texas, including Dallas, Tarrant, Harris, Bexar, Nueces, and Fort Bend Counties. Docket no. 1302-1. LULAC submitted the affidavit of Elia Mendoza, Texas LULAC State Director, who attested that "there are multiple members of LULAC who are eligible voters in each of the Congressional and State Legislative Districts involved in this litigation." *Id.*

[5] Eddie Rodriguez, Milton Gerard Washington, Bruce Elfant, Balakumar Pandian, Alex Serna, Sandra Serna, Betty F. Lopez, David Gonzalez, Beatrice Saloma, Lionor Sorola-Pohlman, Eliza Alvarado, Juanita Valdez-Cox, Jose Martinez, Nina Jo Baker, Travis County, and the City of Austin.

The LULAC Plaintiffs, Perez Plaintiffs, and Rodriguez Plaintiffs have submitted joint briefing as "Joint Plaintiffs" on the congressional plan. Accordingly, the Court will consider their claims together unless necessary to consider them individually. The Perez Plaintiffs include Shannon Perez, Gregory Tamez, Sergio Salinas, Carmen Rodriguez, Nancy Hall, Dorothy DeBose, Jessica Farrar, Wanda F. Roberts, Richard Nguyen Le, and TJ Carson.

Plaintiffs,[6] and Congressman Henry Cuellar.

Plaintiffs assert statutory claims under § 2 of the Voting Rights Act ("VRA") and constitutional claims under the Fourteenth and Fifteenth Amendments to the United States Constitution.

Procedural History and Background

Plaintiffs initially filed several lawsuits in 2011 challenging Plan C185 and Plan H283 enacted by the 82nd Legislature, and the various cases were consolidated. At the time, Texas was subject to preclearance requirements under § 5 of the VRA, and Texas filed a simultaneous action seeking preclearance in the United States District Court for the District of Columbia—*Texas v. United States*, No. 11-1303 (D.D.C).[7] Plaintiffs presented numerous claims in this Court under § 2 of the VRA and the Fourteenth and Fifteenth Amendments, and raised numerous challenges to the plans in the related preclearance litigation in the District of Columbia. The D.C. Court held a trial in January 2012 but had not yet issued a ruling in February 2012.

Faced with impending election deadlines and un-precleared plans that could not be used in the election, this Court was faced with the "unwelcome obligation" of

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[6] Margarita V. Quesada, Romeo Munoz, Marc Veasey, Jane Hamilton, Lyman King, John Jenkins, Kathleen Maria Shaw, Debbie Allen, Jamaal R. Smith, and Sandra Puente.

[7] Texas could have sought administrative preclearance by the Attorney General, but instead sought a declaratory judgment from the D.C. District Court. In *Texas v. United States*, Texas bore the burden of proving that its enacted plans had neither the effect nor the purpose of abridging minority voting rights. 887 F. Supp. 2d 133, 139 (D.D.C. 2012) (citing 42 U.S.C. § 1973c(a)).

implementing interim plans so that the primaries could proceed. *See* docket no. 690 at 2 (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)). This Court considered compromise plans (Plan C226 and Plan H303) proposed by certain parties. Although the plans were supported by some parties, including Defendants, most parties contended that they maintained statutory and constitutional infirmities challenged in Plan C185 and Plan H283. The Court adopted Plan C235 (which was Plan C226 as modified for purely technical reasons) and Plan H309, a plan similar to Plan H303 but with changes in Harris County, Bexar County, Webb County, and Nueces County.

This Court found that adoption of these plans as the interim plans for the 2012 elections was consistent with the deferential standards set forth in *Perry v. Perez*, 565 U.S. 388 (2012) and would significantly benefit the voters, candidates, election administrators, counties, and political parties. Docket nos. 690, 691. The Court noted that its analysis had been expedited and curtailed and that it had been able to make only preliminary conclusions that might be revised upon full analysis. Docket no. 690 at 3 ("[W]e emphasize the preliminary nature of this order and that, except for the fact that PLAN H309 sets the districts for the 2012 elections, nothing in this opinion reflects this Court's final determination of any legal or factual matters in this case or the case pending in the D.C. Court."); docket no. 691 at 1 (noting that "this interim map is a result of preliminary determinations" and "is not a final ruling on the merits of any claims").

As directed by the Supreme Court, this Court in adopting an interim map attempted to determine which claims pending in the D.C. Court preclearance litigation

were "not insubstantial" because the D.C. Court had exclusive jurisdiction over the § 5 claims but had not yet ruled. That Court issued its decision denying preclearance of Plan C185 and Plan H283 on August 28, 2012. *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012). The panel majority found that Plan C185 increased the "representation gap" from three districts to four districts[8] and thus increased the degree of discrimination and was retrogressive. Because the panel did not agree on the appropriate rationale for finding retrogression, they considered the issue of discriminatory intent and unanimously found that "the plan was enacted with discriminatory purpose." *Id.* at 159. The Court specifically noted that unnecessary changes were made to the three African-American ability districts that raised serious concerns about what motivated the Congressional plan, and that Texas failed to explain the changes as anything other than "coincidence." *Id.* at 159-61.

With regard to Plan H283, the D.C. Court found that it would have the effect of abridging minority voting rights in benchmark ability districts 33, 35, 117, and 149, and that Texas did not create any new ability districts to offset those losses. Accordingly, the plan was retrogressive and could not be precleared.

Having found retrogressive effect, the D.C. Court did not need to reach whether Plan H283 was drawn with a discriminatory purpose, but it did "note record evidence that cause[d] concern." 887 F. Supp. 2d at 177. This

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[8] Minority representation fell from 10/32 ability districts (when proportionality would be 13/32) to 10/36 ability districts (when proportionality would be 14/36), thus increasing the representation gap from three districts to four.

evidence included that the process for drawing the plan "showed little attention to, training on, or concern for the VRA" and the failure to create any new minority ability districts among 150 relatively small House districts despite the dramatic Hispanic population growth concentrated primarily in three geographic areas. *Id.* at 177-78. The D.C. Court further stated, "These concerns are exacerbated by the evidence we received about the process that led to enacted HD 117," specifically that "mapdrawers modified HD 117 so that it would elect the Anglo-preferred candidate yet would look like a Hispanic ability district on paper," showing "a deliberate, race-conscious method to manipulate not simply the Democratic vote but, more specifically, the *Hispanic* vote." *Id.* at 178 (emphasis in original).

The D.C. Court also found incredible the testimony of primary House mapdrawer Gerardo Interiano that he was unaware of the capability of Texas's redistricting software (RedAppl) to display racial data at the census block level, which reinforced evidence suggesting that mapdrawers split voter tabulation districts ("VTDs") along racial lines to dilute minority voting power. *Id.* The D.C. Court concluded,

> This and other record evidence may support a finding of discriminatory purpose in enacting the State House Plan. Although we need not reach this issue, at minimum, the full record strongly suggests that the retrogressive effect we have found may not have been accidental.

Id. Texas appealed the D.C. Court's decision denying preclearance to the Supreme Court.

The Court's interim maps, H309 and C235, were used for elections in 2012. Despite urging from the Texas Attorney General to adopt the Court's interim maps during the regular session in 2013,[9] the Texas Legislature's regular session ended in May 2013 with no redistricting action. However, Governor Rick Perry called a special session directing the Legislature to consider "legislation which ratifies and adopts the interim redistricting plans ordered by the federal district court as the permanent plans for districts used to elect members of the Texas House of Representatives, Texas Senate and United States House of Representatives." D-684.

The Legislature reconvened and undertook this redistricting task. During the special session, some changes were made to Plan H309, and it was adopted as Plan H358. By June 23, 2013, the Legislature had passed SB3 and SB4 to enrollment. SB4 "ratified and adopted" this Court's interim congressional map, Plan C235, without change, and repealed SB4 from the 2011 first special session, which had adopted Plan C185. SB3 adopted Plan H358 as the plan for the Texas House of Representatives and repealed HB150 from the 2011 regular session, which had adopted Plan H283. SB3 and SB4 were sent to the Governor on June 24, 2013.

On June 25, 2013, while Texas's appeal of the D.C. Court's decision was pending, the United States Supreme Court issued its decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), holding that the § 4(b) coverage formula of the VRA that determined which jurisdictions

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[9] *See* Quesada-57 (Attorney General Greg Abbott letter to Speaker Straus urging the Legislature to adopt the interim maps during the session).

were subject to § 5 preclearance was unconstitutional. Accordingly, Texas was no longer automatically subject to preclearance requirements. The Governor signed SB3 and SB4 on June 26, 2013.[10]

On June 27, 2013, the Supreme Court vacated the D.C. Court's judgment and remanded for further consideration in light of its intervening decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) and the suggestion of mootness filed by defendant Wendy Davis. *Texas v. United States*, 133 S. Ct. 2885 (June 27, 2013). On remand, the D.C. Court dismissed the preclearance litigation as moot.[11]

On June 28, 2013, Defendants filed a motion to dismiss for lack of subject matter jurisdiction (docket no. 768) in this case, arguing that the case had become moot and should be dismissed. This Court held a status conference on July 1, at which Plaintiffs expressed a desire to amend their complaints to challenge the 2013 plans, and some Plaintiffs stated their intent to amend their existing claims related to the 2011 plans to seek relief under § 3(c) of the VRA.[12] After the hearing, the Court issued an order

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[10] The 2013 plans for the Texas House and U.S. House became law on September 24, 2013. *See* TEX. CONST. ART. III § 39.

[11] Although the Supreme Court did not rule on § 5 itself, the effect of its ruling was to release Texas from the preclearance requirement and render the D.C. preclearance proceedings moot. On remand, Texas moved to dismiss the case as moot, and the United States did not oppose the motion. Some defendants in the case sought leave to amend to assert counterclaims for relief under § 3(c) of the VRA. On December 3, 2013, the D.C. Court granted Texas's motion to dismiss proceedings in that court and denied the motions to amend.

[12] Section 3(c), known as the VRA's "bail-in" provision, states, "If in any proceeding instituted by the Attorney General or an aggrieved

summarily denying the motion to dismiss for lack of jurisdiction without prejudice (docket no. 771) and issued an order directing Plaintiffs to file motions for leave to amend pleadings.

Plaintiffs filed their motions, and the State responded in opposition and with a motion to dismiss as moot all claims related to the 2011 plans. This Court entered an order on September 6, 2013 on the pending motions (docket no. 886) permitting Plaintiffs to amend their claims with regard to the 2011 plans to assert requests for equitable relief under § 3(c) and to assert claims against the 2013 plans. The Court rejected Defendants' mootness argument, for the reasons explained in that Order and in docket no. 1104. In sum, this Court found that the claims against the 2011 plans C185 and H283 were not moot because Plaintiffs alleged that they were continuing to be harmed by the Legislature's actions in enacting Plan C185 and Plan H283, Texas had refused to concede any of Plaintiffs' claims, and Plaintiffs had alleged claims for which meaningful relief was available. The Court further ordered that the 2013 enacted plans, C235 and H358, be used for the 2014 elections.

Thereafter, Plaintiffs filed their amended complaints. Plaintiffs generally maintained their claims against Plan

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person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period [may impose preclearance requirements]." 52 U.S.C. § 10302(c) (formerly 42 U.S.C. § 1973a(c)).

C185 and Plan H283 and sought relief under § 3(c) of the VRA. Most Plaintiffs amended their Complaints to assert claims against Plan C235. Specifically, Congressman Cuellar filed a Second Amended Complaint in Intervention (docket no. 893) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; LULAC filed a Third Amended Complaint (docket no. 894) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the Rodriguez Plaintiffs filed a Second Amended Complaint (docket no. 896) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the Quesada Plaintiffs filed a Third Amended Complaint (docket no. 899) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the NAACP filed a Third Amended Complaint (docket no. 900) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the African-American Congressperson Intervenors filed a Second Amended Complaint (docket no. 901) asserting claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments; the Perez Plaintiffs filed a Sixth Amended Complaint (docket no. 960) asserting intentional discrimination claims under § 2 of the VRA and the Constitution; and MALC filed a Third Amended Complaint (docket no. 897) asserting claims under § 2 of the VRA.

Some Plaintiffs also amended their complaints to assert claims against Plan H358: the Task Force filed a Fourth Amended Complaint asserting statutory and constitutional claims based on changes to HD90 from the Court's interim plan (docket no. 891); MALC asserted claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments (docket no. 897); the NAACP

asserted claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments (docket no. 900); and the Perez Plaintiffs filed a Sixth Amended Complaint (docket no. 960) asserting intentional discrimination claims under § 2 of the VRA and the Fourteenth and Fifteenth Amendments, and those claims were joined by LULAC.

The Texas Latino Redistricting Task Force and the United States did not assert claims against Plan C235, and the Task Force claims are limited to HD90 in Plan H358. The Texas Democratic Party ("TDP") and Gilberto Hinojosa filed a First Amended Cross-claim (docket no. 902) to assert partisan gerrymandering claims under the Equal Protection Clause and the First Amendment against the 2013 plans. Individual Plaintiff John Morris also asserted partisan gerrymandering claims against Plan C235 (docket no. 784). This Court granted Defendants' motion to dismiss the political gerrymandering claims against the 2011 and 2013 plans in docket no. 886 and docket no. 1104, and thus all of TDP's and Morris's claims were dismissed. The Court also granted summary judgment on the Fifteenth Amendment claims against the 2011 and 2013 plans in docket no. 275 and docket no. 1108. *See* docket no. 1387.

This Court held a trial on Plan H283 in July 2014 and on Plan C185 in August 2014 and later issued extensive fact findings and rulings on Plaintiffs' claims. The Court found that certain aspects of those plans violated § 2 of the VRA and the Fourteenth Amendment. Docket no. 1365 (Order on Plan H283); docket no. 1364 (Fact Findings

related to Plan H283); docket no. 1390 (Amended Order on Plan C185); docket no. 1340 (Fact Findings).[13]

Plaintiffs contend that certain aspects of Plan C185 and Plan H283 that the Court found to be the product of discriminatory intent or constitutional and statutory violations were maintained in Plan C235 and Plan H358, rendering them infirm. In addition, Plaintiffs bring various statutory and constitutional challenges against Plan C235 and Plan H358. This Court held a trial on Plan C235 and Plan H358 in July 2017 and now issues rulings on Plaintiffs' claims against Plan C235.

I. Legal Standards

At this stage, this case involves claims under § 2 of the VRA and the Fourteenth Amendment. The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969). Under § 2, Plaintiffs assert both "results" vote dilution and intentional discrimination/vote dilution claims. Under the Fourteenth Amendment, Plaintiffs assert both intentional discrimination/vote dilution and *Shaw*-type racial gerrymandering claims. The Court discussed these claims previously in its decisions on the 2011 plans, and will briefly summarize the applicable standards here.

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[13] Judge Garcia and Judge Rodriguez adopt the prior fact findings and opinions and incorporate them into this Order because they are relevant to the 2013 plan claims. In this Order, Judge Smith agrees that the Court's orders on the 2011 plans are law of the case. The findings and conclusions in this order are therefore not inconsistent with what this district court panel has already decided.

A. § 2 of the Voting Rights Act

Section 2 of the VRA "was designed as a means of eradicating voting practices that minimize or cancel out the voting strength and political effectiveness of minority groups." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479 (1997) (internal quotations omitted). In its current form, § 2(a) provides that no voting standard, practice, or procedure "shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . as provided in subsection (b)." 52 U.S.C. § 10301(a). Under section 2(b), a state violates § 2 "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State . . . are not equally open to participation by members of a class of citizens protected by [§ 2(a) of the VRA] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Section 2 prohibits all race discrimination in voting,[14] but claims under § 2 generally assert vote denial or vote dilution injuries.

The Supreme Court held in *Mobile v. Bolden*, 446 U.S. 55 (1980),that a race-based vote dilution claim under the Fourteenth Amendment required racially discriminatory intent, not simply dilutive results.[15] In passing the 1982

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[14] *Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986).

[15] *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997) ("Since 1980, a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment,

amendments to the VRA, Congress reacted to that decision. *Velasquez v. City of Abilene, Tex.*, 725 F.2d 1017, 1021 (5th Cir. 1984). As the Fifth Circuit noted in *LULAC v. Clements*, 999 F.2d 831, 849-51 (5th Cir. 1993), "the 1982 Amendments [to § 2] 'codify' the 'results test' articulated in" constitutional voting discrimination cases prior to *Mobile v. Bolden*, making clear that a § 2 violation could be proved without discriminatory intent.[16] However, the Legislative history of § 2 and case law also make clear that voters may bring a claim based on discriminatory voting practices using either the results test or an intentional discrimination test.[17] The Senate Report further states

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has been required to establish that the State or political subdivision acted with a discriminatory purpose.").

[16] The Supreme Court noted in *Gingles* that the Senate Report states that amended § 2 was designed to restore the "results test"—the legal standard that governed voting discrimination cases prior to *Mobile v. Bolden* and that in pre-*Bolden* cases such as *White v. Regester* plaintiffs could prevail by showing that, under the totality of circumstances, a challenged election law or procedure had the effect of denying a protected minority an equal chance to participate in the electoral process. *Gingles*, 478 U.S. at 44 n.8; *see also Jones v. City of Lubbock*, 727 F.2d 364, 379 (5th Cir. 1984) (the amended § 2 codifies pre-*Bolden* vote dilution law).

[17] S. REP. NO. 97-417 ("The Amendment to the language of section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.") (footnote omitted); *United States v. Brown*, 561 F.3d 420, 432 (5th Cir. 2009) ("To violate the statute, however, these practices must be undertaken with an intent to discriminate or must produce discriminatory

that, if a § 2 plaintiff chooses to prove discriminatory intent, "direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions" would be relevant evidence of intent. *McMillan*, 748 F.2d at 1046-47 (quoting S. REP. NO. 97-417 at 27 n.108).

1. Results Claims

As noted, Congress amended § 2 of the VRA in 1982 "to prohibit legislation that *results* in the dilution of a minority group's voting strength, regardless of the legislature's intent." *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (emphasis in original). Such results claims are governed by the framework established in *Thornburg v. Gingles*, 478 U.S. 30 (1986). *Gingles* identified three threshold conditions for establishing a § 2 results violation: (1) the racial group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the racial group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Johnson v. De Grandy*, 512 U.S. 997, 1006-07 (1994); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017).

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results."); *Garza v. Cty. of Los Angeles*, 918 F.2d 763, 766 (9th Cir. 1990) ("[A]fter the 1982 amendment, the Voting Rights Act can be violated by both intentional discrimination in the drawing of district lines and facially neutral apportionment schemes that have the effect of diluting minority votes."); *McMillan v. Escambia Cty., Fla.*, 748 F.2d 1037, 1046 (5th Cir. 1984) ("Congress intended that fulfilling *either* the more restrictive intent test or the results test would be sufficient to show a violation of section 2.")(emphasis in original).

"When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994). A minority population (either singly or combined in coalition with other minorities[18]) is sufficiently large when it constitutes greater than 50% of the citizen voting age population of the district. *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009) (plurality); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853 (5th Cir. 1999). Because the decennial census data does not include CVAP data, the Court has instructed the parties to use the five-year 2011-2015 ACS survey data to best approximate the CVAP in 2013, when the maps were enacted.[19]

Generally, to evaluate § 2 results claims, it must be determined how many "reasonably compact districts" exist in the enacted plan, and whether Plaintiffs have demonstrated that more were required, which is usually done through presentation of demonstration maps. *LULAC v. Perry*, 548 U.S. 399, 430 (2006) ("*De Grandy*

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[18] As discussed at length in the Court's opinion on plan H283 (and not repeated here), the Court finds that § 2 can require the creation of coalition districts.

[19] Because the § 2 results test is concerned only with whether the districting scheme *results* in vote dilution, and not the Legislature's knowledge or intent, *Shaw*, 509 U.S. at 641, the Court has concluded that evidence that best reflects the population at the time of redistricting should be considered to determine whether vote dilution resulted from the districting plans, regardless of whether the evidence or data was available to the Legislature at the time of redistricting.

requires a comparison between a challenger's proposal and the 'existing number of reasonably compact districts.'"). When evaluating compactness, the Court focuses on the compactness of the minority population (in terms of its size and concentration), not the compactness of the contested district or necessarily the precise shape of its boundaries, though the shape of the district is relevant insofar as it provides evidence concerning the compactness of the minority population. *LULAC v. Perry*, 548 U.S. 399, 433 (2006); *Houston v. Lafayette Cty., Miss.*, 56 F.3d 606, 611 (5th Cir. 1995).[20]

If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district, and a district that reaches out to grab small and apparently isolated minority communities is not reasonably compact. *Bush v. Vera*, 517 U.S. 952, 979 (1996); *LULAC*, 548 U.S. at 432. However, members of a racial group in different areas could share similar interests and therefore form a compact district "if the areas are in reasonably close proximity." *LULAC*, 548 U.S. at 435. "A district would not be sufficiently compact if it was so convoluted that there was no sense of community, that is, if its members and its representative could not easily tell who actually lived in the district." *Rodriguez v. Harris Cty., Tex.*, 964 F. Supp. 2d 686, 737-38 (S.D. Tex. 2013) (citing *Clark v. Calhoun Cty., Miss.*,

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[20] In its most recent decision, the Supreme Court phrased the requirement as being that the minority population must be sufficiently large and geographically compact to constitute a majority "in some reasonably configured legislative district." *Harris*, 137 S. Ct. at 1470.

21 F.3d 92, 96 (5th Cir. 1994) (noting that "[a] number of courts have concluded that the first *Gingles* precondition is not satisfied if the proposed district does not retain a natural sense of community such that it can be effectively represented")).

Further, the § 2 compactness inquiry must take into account traditional districting principles such as maintaining communities of interest and traditional boundaries. *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (citing *Bush v. Vera*, 517 U.S. 952, 977 (1996)); *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1391-92 (E.D. Wa. 2014) ("The compactness inquiry under § 2 . . . focuses more generally on whether the proposed minority district reasonably comports with 'traditional districting principles' such as contiguousness, population equality, maintaining communities of interest, respecting traditional boundaries, and providing protection to incumbents."). "The recognition of nonracial communities of interest reflects the principle that a State may not assume from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls." *LULAC*, 548 U.S. at 433 (internal quotations and alterations omitted).

Thus, to evaluate compactness, the Court considers the dispersion of the relevant minority population, the shape of the proposed district (as measured by a visual evaluation and by statistical measures of compactness) and the causes underlying its shape, and the district's compliance with traditional redistricting principles (such as respect for communities of interest and traditional boundaries). *See Rodriguez*, 964 F. Supp. 2d at 737-54; *see also Vera v. Richards*, 861 F. Supp. 1304, 1341 (S.D. Tex. 1994) (noting that a district's compactness must be a

relative measure based on location and population density and that "[i]n a major urban county, compactness makes little sense if considered in terms of geographic sprawl alone, but it seems far more probative when viewed in terms of a city's or county's neighborhoods, geopolitical subdivisions, and business location"), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996).[21]

The second and third *Gingles* preconditions are referred to collectively as "racially polarized voting." Defendants conceded the existence of racially polarized voting across Texas, except in Nueces and Kleberg Counties, in terms of the fact that minority voters and Anglo voters tend to vote differently. The fact that minority voters and Anglo voters tend to support different candidates in Texas is essentially undisputed and is supported by all the expert testimony in the case, regardless of the methodology used (except with regard to Travis County).[22] However, Defendants dispute

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[21] If the proposed demonstration district is bizarrely shaped because the minority population within it is not reasonably compact, then § 2 generally will not require the district. However, § 2 does not require compact districts, and bizarre shape may be the result of non-racial factors such as geographical constraints and respecting precinct and city boundaries. Thus, the shape of the district is relevant, but the Court must examine the reasons for the district's shape.

[22] Racial bloc voting and minority-group political cohesion never can be assumed, but must be proved in each case in order to establish that a redistricting plan dilutes minority voting strength in violation of § 2. *Shaw v. Reno*, 509 U.S. 630, 653 (1993) (citing *Growe v. Emison*, 507 U.S. 25, 40-41 (1993)). However, there is ample evidence in the record to support Defendants' concession, at least concerning Latino voter cohesion, African-American voter cohesion, and Anglo bloc voting. Defendants do not concede that minority voters are cohesive

whether such racially polarized voting is legally significant in terms of the degree of minority cohesion and Anglo crossover voting, and in terms of whether such racially polarized voting is the result of race as opposed to politics.[23]

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with each other for purposes of coalition districts because they often vote for different candidates in primary elections, though they vote cohesively in general elections for the candidates who emerge from the Democratic primaries. In addition, the Court previously found in its Opinion on Plan C185 that there is not racially polarized voting in Travis County because Anglo voters do not typically vote sufficiently as a bloc to usually defeat minority-preferred candidates.

[23] In this regard, Defendants rely on the Fifth Circuit's decision in *LULAC v. Clements*, 999 F.2d 23 831, 850 (5th Cir. 1993) (en banc), in which the court accepted the argument that "[w]hen the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens," vote dilution is not "on account of race or color" as required by the VRA. The court noted that the question was "not whether white residents tend to vote as a bloc, but whether such bloc voting is 'legally significant.'" *Id.* The district court held that plaintiffs "need only demonstrate that whites and blacks generally support different candidates to establish legally significant white bloc voting." *Id.* Defendants argued that the district court erred in refusing to consider the nonracial causes of voting preferences they offered. The Fifth Circuit agreed, holding that "[i]n holding that the failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the district court loosed § 2 from its racial tether and fused illegal vote dilution and political defeat," in violation of *Whitcomb v. Chavis*, 403 U.S. 124 (1971) and the consensus of a majority of justices in concurring opinions in *Thornburg v. Gingles*, 478 U.S. 30 (1986) (specifically Justices Powell, Rehnquist, O'Connor, Burger, and White). *Clements*, 999 F.2d at 850-51.

If all three *Gingles* preconditions are satisfied, § 2 requires consideration of the "totality of circumstances" to determine whether members of a racial group have less opportunity than do other members of the electorate. *LULAC v. Perry*, 548 U.S. 399, 425-26 (2006). The Supreme Court has referred to the Senate Report on the 1982 amendments to the VRA, which identifies factors typically relevant to a § 2 claim, including:

> the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group . . .; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 426 (quoting S. REP. NO. 97-417 at 117,206). The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group, and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous, may have probative value. *LULAC*, 548 U.S. at 426.

Last, although § 2 does not guarantee proportional representation, proportionality—whether the number of

districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area—is always a relevant consideration. *LULAC*, 548 U.S. at 426; *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994).

2. § 2 Intentional Discrimination/Intentional Vote Dilution

As discussed in this Court's opinion on Plan C185, the Supreme Court has declined to decide whether the *Gingles* preconditions apply to intentional vote dilution/discrimination claims under § 2. Docket no. 1390 at 116 ("[T]he Supreme Court expressly stated in *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009), that it did not consider 'whether intentional discrimination affects the *Gingles* analysis' and that its holding (setting forth the majority-minority requirement to satisfy the first *Gingles* factor for a § 2 results claim) 'does not apply to cases in which there is intentional discrimination against a racial minority.'"). This Court previously concluded that Plaintiffs are not required to satisfy the first *Gingles* precondition to prove discriminatory racial gerrymandering and intentional vote dilution, but that the other § 2 factors, including the existence of racially polarized voting and the totality of circumstances, remain relevant to such claims. Docket no. 1390 at 118. The ultimate § 2 inquiry remains whether minority voters have less opportunity to participate in the political processes and to elect candidates of their choice. *See Rogers v. Lodge*, 458 U.S. 613, 624 (1982).

Further, the rubric for analyzing discriminatory purpose under § 2 is the same as under the Equal Protection Clause of the Constitution. Discriminatory

intent is shown when racial discrimination was a motivating factor in the governing body's decision to adopt or maintain a voting practice or procedure. *Brown*, 561 F.3d at 433 ("Under the intent-based approach, '[r]acial discrimination need only be one purpose, and not even a primary purpose, of an official act' for a violation [of § 2] to occur.")[24]; *Garza*, 918 F.2d at 766 ("To the extent that a redistricting plan deliberately minimizes minority political power, it may violate both the Voting Rights Act and the Equal Protection Clause of the fourteenth amendment.").

B. Fourteenth Amendment claims

Plaintiffs bring two types of claims under the Equal Protection Clause of the Fourteenth Amendment, the central purpose of which "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). The first claim is a racial discrimination claim, which requires racially discriminatory intent and discriminatory effect. The second claim is a *Shaw*-type racial gerrymandering

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[24] In *United States v. Brown*, the Fifth Circuit noted that the Senate factors supply a source of circumstantial evidence regarding discriminatory intent, as do the factors set forth in *Arlington Heights*. 561 F.3d at 433. As this Court previously concluded, these factors are a relevant source of evidence to be considered as part of the totality of circumstances. However, discriminatory results remain insufficient by themselves to establish discriminatory intent. *Mobile*, 446 U.S. at 71 n.17 ("Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.") (quoting *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

claim, the essence of which is that mapdrawers have separated voters into districts on the basis of race, and which does not require racially discriminatory intent.[25]

1. Intentional Racial Discrimination/Intentional Vote Dilution

Legislative apportionment schemes may violate the Fourteenth Amendment if "conceived or operated as purposeful devices to further racial discrimination by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (internal quotations omitted) (affirming district court's finding that at-large voting scheme, although racially neutral when adopted, was being maintained for the invidious purpose of diluting the voting strength of the black population).[26] A showing of racially motivated discrimination is a necessary element for a successful claim of unconstitutional vote

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[25] *Miller v. Johnson*, 515 U.S. 900, 910 (1995) (noting that a *Shaw*-type claim is "analytically distinct" from a vote dilution claim because a vote dilution claim "alleges that the State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities,' an action disadvantaging voters of a particular race[, while] the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts" regardless of motive) (internal citations omitted).

[26] *See also Shaw v. Reno*, 509 U.S. 630, 641 (1993) (electoral schemes "violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength"); *Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (legislative apportionment scheme is unconstitutional if its purpose was "invidiously to minimize or cancel out the voting potential of racial or ethnic minorities").

dilution under the Fourteenth Amendment. *Reno v. Bossier Barish Sch. Bd.*, 520 U.S. 471, 481 (1997) (citing *Mobile v. Bolden*, 446 U.S. 55, 66 (1980)).

Discriminatory intent need not be proved by direct evidence. *Rogers*, 458 U.S. at 618. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Id.* (quoting *Arlington Heights*, 429 U.S. at 265)[27]. Determining the existence of a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.*

Courts should look to the Supreme Court's decision in *Arlington Heights* for guidance in analyzing whether invidious discriminatory purpose was a motivating factor in a government body's decisionmaking. *Bossier Parish*, 520 U.S. at 488. The important starting point for assessing discriminatory intent is "the impact of the official action whether it 'bears more heavily on one race than another.'" *Id.* at 489. Other relevant considerations include: the historical background of the jurisdiction's decision, the specific sequence of events leading up to the challenged decision, departures from the normal procedural sequence, and the legislative history, especially any contemporary statements by members of the decisionmaking body. *Id.*; *Arlington Heights*, 429 U.S. at 268.

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[27] As noted, disproportionate effects alone are insufficient to establish a claim of unconstitutional vote dilution.

2. "*Shaw*-type" Racial Gerrymandering Claim

Although a "legislature always is *aware* of race when it draws district lines," *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (emphasis in original), it may not use race as the predominant factor in drawing district lines unless it has a compelling reason. *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017). A *Shaw*-type racial gerrymandering claim[28] is "that race was improperly used in the drawing of the boundaries of one or more specific electoral districts." *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) (emphasis omitted). In such a claim, the plaintiff's evidentiary burden is "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motiving the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 1267.[29] The Court's decision in *Bethune-Hill v. Virginia*

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[28] The Court refers to these claims as *Shaw*-type claims because the Supreme Court first recognized the viability of such a claim under the Equal Protection Clause in *Shaw v. Reno*, 509 U.S. 630 (1993).

[29] Laws that classify citizens on the basis of race are constitutionally suspect, regardless of whether the reason for the classification is benign or the purpose remedial. *Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996); *see also id.* at 907 ("Racial classifications are antithetical to the Fourteenth Amendment . . . ."). The essence of a *Shaw*-type equal protection claim is that the State has used race as a basis for separating voters into districts. *Miller*, 515 U.S. at 911. Such use of race "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." *Shaw v. Reno*, 509 U.S. 630, 650 (1993). Further, such use of race reinforces the belief "that individuals should be judged by the color of their skin" and "[r]acial gerrymandering,

State Bd. of Elections, 137 S. Ct. at 799, additionally made clear that "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering" and that courts should evaluate the predominant motive for the design of the district as a whole.

If race predominates, strict scrutiny applies. To survive strict scrutiny, the challenged districting plan must be narrowly tailored to serve a compelling governmental interest. *Bush v. Vera*, 517 U.S. 952, 959, 976 (1996). For a racial classification to serve a compelling interest, the Legislature must have a strong basis in evidence to support that interest before it implements the classification. *Shaw v. Hunt*, 517 U.S. 899, 910 (1996). Further, the means chosen to accomplish the State's asserted purpose must be specifically and narrowly tailored to accomplish that purpose. *Id.* at 908. To be narrowly tailored, the legislative action must substantially address, if not achieve, the avowed purpose. *Id.* at 915.

This Court previously concluded that compliance with § 2 of the VRA constitutes a compelling governmental interest. Docket no. 1390 at 42 (citing *Bush*, 517 U.S. at 994 (O'Connor, J., concurring); *Clark v. Calhoun Cty., Miss.*, 88 F.3d 1393, 1405-06 (5th Cir. 1996)). When a State invokes the VRA to justify race-based districting, it "must have a strong basis in evidence for concluding that the

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even for remedial purposes, may balkanize us into competing racial factions" and "threatens to carry us further from the goal of a political system in which race no longer matters." *Id.* at 657.

three *Gingles* preconditions exist in order to claim that its redistricting plan is reasonably necessary to comply with § 2." *Clark*, 88 F.3d at 1405-06; *see also Shaw*, 517 U.S. at 915; *Bush*, 517 U.S. at 978 ("The State must have a 'strong basis in evidence' for finding that the threshold conditions for § 2 liability [i.e., the *Gingles* preconditions] are present."); *Harris*, 137 S. Ct. at 1471.[30] "If a State has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. But if not, then not." *Harris*, 137 S. Ct. at 1470 (citation omitted).

The legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored. *Shaw v. Hunt*, 517 U.S. at 915. "If a § 2 violation is proved for a particular area, it flows from the fact that individuals in this area 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *Id.* at 917 (quoting 42 U.S.C. § 1973(b)). The State may "use one majority-minority district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be accommodated." *LULAC v. Perry*, 548 U.S. 399, 429 (2006).

Compliance with § 5 of the VRA was also a compelling state interest at the time these plans were enacted. However, "a reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid

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[30] "[The] 'strong basis' (or 'good reasons') standard gives States 'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Harris*, 137 S. Ct. at 1464.

retrogression." *Shaw v. Reno*, 509 U.S. 630, 655 (1993); *see also Alabama LBC*, 135 S. Ct. at 1274 (noting that the proper question for § 5 nonretrogression is, "To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?").

II. Claims based on legislative intent

This case is unusually complex given the Legislature's enactment in 2013 of the Court's interim plans. As noted, the 2013 enactment raised questions of mootness in the 2011 plan phase, and now raises difficult questions concerning the proper resolution of Plaintiffs' *Shaw*-type and intentional vote dilution claims in the 2013 plan case.

Although Plaintiffs' claims focus on specific areas where they have suffered harm, as they must given that racial discrimination and vote dilution claims belong to individuals and not the minority group as a whole,[31] the redistricting plans are statewide plans, and Plaintiffs contend that the statewide plans were adopted with discriminatory intent. In addition, with regard to specific areas in which this Court found *Shaw*-type violations and intentional discrimination, Plaintiffs contend that such

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[31] *See LULAC v. Perry*, 548 U.S. 399, 437 (2006) ("A local appraisal is necessary because the right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual members.'"); *Alabama LBC v. Alabama*, 135 S. Ct. 1257, 1265-66 (2015) (noting that the harms that underlie a racial gerrymandering claim are personal, including being personally subjected to a racial classification and being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group, though noting that voters could make the claim that every individual district in a state suffers from racial gerrymandering).

violations remain in the 2013 plans. Defendants contend that the 2013 Legislature could have no discriminatory intent because it simply relied on this Court's judgment that the plans contained no legal infirmities, despite the interim nature of the plans and the Court's warnings that its decisions were necessarily hasty and not based upon a full review of the facts or the law. Defendants assert that the 2013 Legislature's lack of intent to discriminate in 2013 and the fact that it did not actually draw any districts subject to *Shaw*-type challenges in the interim plans in 2013 mean that all such claims must fail for lack of the necessary intent.[32]

Defendants' position incorrectly assumes that the intent inquiry must be limited to the drawing of district lines in 2013. The Fifth Circuit has rejected such a position: "[C]ases of this circuit emphasize that the search for improper motivation does not end at the enacting stage." *Nevett v. Sides*, 571 F.2d 209, 221 (5th Cir. 1978). Rather, the Fifth Circuit has proposed three means by which a plaintiff could meet the purpose standard: A plaintiff could demonstrate either through direct or circumstantial evidence that the government body *adopted* the electoral scheme with a discriminatory purpose, that the government body *maintained* the scheme with discriminatory purpose,[33] or that the system

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[32] Defendants refer specifically to district lines that remain unchanged from the interim plans; the Task Force Plaintiffs have raised a new *Shaw* claim against changes made to HD90 in Plan H358 during the 2013 special session. This discussion does not involve that claim.

[33] *McMillan v. Escambia Cty., Fla.*, 688 F.2d 960 (1982) (affirming district court's holding that at-large voting scheme was being maintained for a discriminatory purpose), *vacated on other*

furthered pre-existing intentional discrimination.[34] *Jones v. City of Lubbock*, 727 F.2d 364, 377 (5th Cir. 1984) (discussing *Nevett*, 571 F.2d at 217-21).[35] Thus, under

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grounds 466 U.S. 48 (1984) (vacating judgment on constitutional grounds and remanding for consideration of whether § 2 claims would support the judgment); *see also Mobile v. Bolden*, 446 U.S. 55 (1980) (considering whether maintenance of Mobile's at-large system for election of City Commissioners violated the Fourteenth Amendment as purposefully racially discriminatory).

[34] *See Kirksey v. Bd. of Sup'rs of Hinds Cty., Miss.*, 554 F.2d 139, 142 (5th Cir. 1977) ("A redistricting plan is constitutionally impermissible as racially discriminatory if it is a racially motivated gerrymander or if it perpetuates an existent denial of access by the racial minority to the political process."). In *Kirksey*, the court stated:

> Where a plan, though itself racially neutral, carries forward intentional and purposeful discriminatory denial of access that is already in effect, it is not constitutional. Its benign nature cannot insulate the redistricting government entity from the existent taint. If a neutral plan were permitted to have this effect, minorities presently denied access to political life for unconstitutional reasons could be walled off from relief against continuation of that denial. The redistricting body would only need to adopt a racially benign plan that permitted the record of the past to continue unabated. Such a rule would sub silentio overrule *White v. Regester*. It would emasculate the efforts of racial minorities to break out of patterns of political discrimination.

Id. at 146-47. The Court acknowledged that the Supreme Court had required discriminatory purpose in *Washington v. Davis* and in *Arlington Heights*, but reasoned that "nothing in these cases suggests that, where purposeful and intentional discrimination already exists, it can be constitutionally perpetuated into the future by neutral official action." *Id.* at 148.

[35] In *Nevett v. Sides*, 571 F.2d 209, 221 (5th Cir. 1978), the Fifth Circuit recognized that a plan, racially neutral at its adoption, may further preexisting intentional discrimination, or it may be maintained for invidious purposes. Whether invidious discrimination

these precedents, although the 2013 Legislature did not draw the challenged districts in Plan C235 and Plan H358 (other than HD90), Plaintiffs could nevertheless establish their claim by showing that the Legislature adopted the plans with a discriminatory purpose, maintained the district lines with a discriminatory purpose, or intentionally furthered preexisting intentional discrimination.

In addition, the Supreme Court case of *Hunter v. Underwood*, 471 U.S. 222 (1985), refutes Defendants' position. In *Hunter*, the Supreme Court held that a felon disenfranchisement provision adopted with discriminatory intent in 1901 violated the Equal Protection Clause in 1985, regardless of the fact that certain of the more blatantly discriminatory selections had been struck down by the courts, because "its original

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motivates the adoption or maintenance of a districting scheme or whether the plan furthers preexisting purposeful discrimination, the intent requirement may be satisfied by direct or circumstantial evidence. *Nevett* was decided before the Supreme Court's decision in *Mobile v. Bolden*, but as the Supreme Court noted in *Rogers v. Lodge*, the Fifth Circuit held in *Nevett* that a showing of racially motivated discrimination is a necessary element in an equal protection vote dilution claim. *Rogers*, 458 U.S. at 621 (quoting *Nevett*, 571 F.2d at 219). In *Jones v. City of Lubbock*, 727 F.2d 364, 377 (1984), the Fifth Circuit stated that *Mobile v. Bolden* "cast doubt on the viability of this court's analysis in *Nevett II*." What it cast doubt on, however, is what proof suffices to establish discriminatory purpose, as the Fifth Circuit had relied on the "objective factors endorsed in *Zimmer*" and post-*Bolden* cases "differed in their evaluation of the extent to which the *Zimmer* analysis survived *Bolden*." *Id.* at 378; *see also Corder v. Kirksey*, 639 F.2d 1191, 1194 (5th Cir. 1981) ("Our failure, however, appears to have turned on the quantum of evidence required for such a finding [of discriminatory intent], rather than upon the substance of the approach itself.").

enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." *Id.* at 233. With regard to those areas in Plan C185 and Plan H283 where the Court found that district lines were drawn with impermissible motive and those lines remain unchanged in Plan C235 and Plan H358 such that discrimination continues to have its intended effect, *Hunter* indicates that those portions of the plans remain unlawful. In those areas, the district lines were motivated by a desire to discriminate on account of race, and they continue to have that effect; thus, they violate § 2 and the Constitution.

Defendants contend that the Legislature's adoption of the Court's interim plans nevertheless removed any such illegality from the plans; they assert that their enactment of the plans in 2013 with no improper motive removes any discriminatory intent. *Hunter* involved the passage of time and a narrowing of the discriminatory legislation by the courts; it did not involve a later reenactment of the narrowed disenfranchisement law, which is what Defendants now claim cleanses the plans. Other courts have considered the effect of subsequent legislative enactments on the legislative intent inquiry. The most relevant case, because it comes from the Fifth Circuit and involves redistricting, is *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000).

In *Chen*, the plaintiffs mounted a *Shaw*-type racial gerrymandering claim against the City of Houston's districting, and contended that "the 1997 plan substantially maintained the borders of previous plans, and that those borders were set by a process in which race—specifically, the desire to create two black and two Hispanic single member districts—predominated." *Id.* at

513. The plaintiffs argued "that the City violated *Shaw* by failing to make substantial changes in a districting structure that was originally designed in a manner that race predominated over traditional districting concerns." *Id.* at 518.

The Fifth Circuit rejected the City's assertion and the district court's conclusion that the intent behind the creation of the prior plans was not properly before the court. *Id.* It noted that, in the context of the VRA, "evidence that impermissible racial intent had tainted the plan upon which the challenged plan was based has been allowed, even when enough time has elapsed for a substantial degree of familiarity and political reliance to emerge." *Id.* The Court then considered Plaintiffs' evidence concerning the earlier redistricting process, but found that its quality fell "far short of that introduced in the cases examined by the Supreme Court," and the Court did not find that race predominated in the drawing of earlier plans (*i.e.*, there was no prior impermissible reliance on race). *Id.* Later in the opinion, the Court stated that,

> while the district court erred in categorically and totally dismissing evidence of intent garnered from prior plans, it was correct to point out that the state of mind involved in the prior plans is not of itself what is precisely and directly the ultimate issue before the Court in this case. We have noted in a different context that while under *Hunter* the discriminatory intent of the original drafter may carry forward despite subsequent judicial invalidation of the most obviously discriminatory provisions, intervening reenactment

with meaningful alterations may render the current law valid.

Id. at 521 (citing *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998)).[36] It continued, "We do not suggest that the

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[36] The Court included the following parenthetical to describe *Cotton*: "while [the] disenfranchisement constitutional provision originated in an attempt to discriminate, subsequent reenactment with alterations approved by voters added categories of crimes originally excluded because they were not considered 'Black' crimes and subtracted a less serious offense that had been considered a 'Black' crime." In *Cotton*, the Fifth Circuit noted that *Hunter* "left open the possibility that by amendment, a facially neutral provision . . . might overcome its odious origin." 157 F.3d at 391. Although the disenfranchisement provision at issue was originally enacted in 1890 with discriminatory intent, it was amended in 1950 and 1968 through a deliberative process, which the court held could "supersede" the previous provision and "remove[] the discriminatory taint associated with the original version" unless the amendments "were adopted out of a desire to discriminate against blacks." *Id.* at 391-92. Because the Court found no such evidence and because the amended statute sought "to penalize all criminals convicted of certain crimes, Hunter [did] not condemn" the law. *Id.* at 392. Thus, the Court based its holding on the lack of new discriminatory intent during re-enactment and the fact that the amended statute no longer targeted "black" crimes.

The Court notes that there is an important distinction between a felon disenfranchisement law and a district that violates *Shaw*. According to *Cotton*, a law disenfranchising convicted felons is unconstitutional only if it has the intent and effect of racial discrimination, making discriminatory purpose the paramount consideration. Discriminatory purpose is not an element of a *Shaw*-type claim. As this Court has discussed, a district drawn in violation of the *Shaw* principles is illegitimate regardless of whether it was drawn with racially discriminatory purpose because its illegality turns on whether race predominated in the decision of which voters to include and exclude in the district, whenever that decision is made,

changes implemented in 1993, 1995, and 1997 to the original framework were as dramatic as those in *Cotton*. However, that case broadly stands for the important point that when a plan is reenacted—as opposed to merely remaining on the books like the provision in *Hunter*—the state of mind of the reenacting body must also be considered." *Id.*

Plaintiffs argue that the taint of discriminatory intent is generally removed from amended legislation only where a fact-specific inquiry reveals that the new statute was enacted significantly later than the discriminatory one,[37] legislators underwent a "deliberative process" prior

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and whether there was a strong basis in evidence for such use of race. The passage of time or the re-enactment of a plan including the identical district does not typically change any facts concerning which voters were placed within or without the district when it was drawn, unlike discriminatory intent, which can change over time. Thus, the original decisions concerning which voters to place in and out of a district should remain the focus for inquiry in a *Shaw* claim, regardless of a later re-enactment of the identical district, unless there is a showing that the legislature specifically considered who should be in the district during the later re-enactment. Similarly, whether the legislature had a strong basis in evidence for the use of race originally should remain the operative inquiry. However, to the extent a subsequent legislature may have a strong basis in evidence for a previous use of racially predominant criteria that did not exist at the time of the initial enactment, that legislative intent would be relevant in determining whether a district that was an unconstitutional gerrymander when drawn remains so.

[37] The 2013 plans were enacted by a substantially similar Legislature with the same leadership only two years after the original enactment. This factor weighs in Plaintiffs' favor. In addition, the *Arlington Heights* factor of the history of discrimination continues to support a finding of discrimination, bolstered by this Court's finding of discriminatory intent by the 2011 Legislature in passing the 2011

to amendment or reenactment, and the new statute does not continue the same adverse racially disparate impact. *E.g.*, docket no. 1524 at 9-10. While the Court does not agree that the presence or absence of any of these factors is necessarily dispositive, it agrees that these are relevant considerations for analysis. Based on *Chen/Cotton* and *Hunter*, the Court finds the most important consideration is whether the 2011 plans continue to have discriminatory or illegal effect, and whether the reenactment furthers that existing discrimination: "A state law prohibiting exercise of the vote . . . is unconstitutional if 'its original enactment was motivated by a desire to discriminate against blacks on account of race and the section *continues to this day to have that effect.*'" *Cotton*, 157 F.3d at 391 (citing *Hunter*, 471 U.S. at 233) (emphasis added).

In *Chen*, the Fifth Circuit found no *Shaw* violation in the original enactment; thus, there was no issue of a continuing harm. Similarly, in *Cotton*, the Fifth Circuit noted that the amendments to the felon disenfranchisement statute meant that it no longer targeted "black" crimes and that it "now seeks only to penalize all criminals convicted of certain crimes" such that there was no longer any unconstitutional harm flowing from the statute. *Cotton*, 157 F.3d at 392.

Here, in contrast, specific portions of the 2011 plans that this Court has found to be discriminatory or unconstitutional racial gerrymanders continue unchanged in the 2013 plans, their harmful effects "continu[ing] to this day." *Hunter*, 471 U.S. at 233. The fact that this Court made changes to the statewide plans

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plans themselves. Further, there is no indication that the Legislature mitigated its hostility to minority districts.

and the Legislature then adopted the Court's plans does not change this fact. Further, the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans. No changes were made to the congressional plan, and changes to the House plan were subject to severe constraints, rendering them largely cosmetic. Although this Court did not rule out the possibility that coalition districts could be required or that the County Line Rule would have to yield to the VRA, the Legislature continued its steadfast refusal to consider either possibility. And despite the findings of discriminatory intent by the D.C. Court, there is no indication that the Legislature looked to see whether any discriminatory taint remained in the plans. Instead, the Legislature pushed the redistricting bills through quickly in a special session.[38] Rep. Martinez Fischer testified that necessary resources were not allocated to support a true deliberative process.[39]

Moreover, the adoption of the interim plans intentionally furthered and continued any discrimination that might be found in the 2011 plans and incorporated into the 2013 plans. The Legislature did not adopt the Court's plans with the intent to adopt legally compliant plans free from discriminatory taint, but as part of a litigation strategy. Defendants had steadfastly maintained that their 2011 plans had no legal infirmities—

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[38] The special session did not have a two-thirds rule in the Senate or a calendar rule in the House.

[39] The HRC did not have counsel when the session started, and later Darby announced his intent to hire counsel only for himself. The attorneys later asked to withdraw and the committee was then directed to the TLC. JX-13.4 at 4-5.

throughout this litigation in 2011, when sponsoring the compromise plans in 2012 that became the interim plans, and thereafter. Although the D.C. Court found that the 2011 plans violated § 5 of the VRA and cited evidence of discriminatory intent, Defendants did not accept those rulings and instead appealed to the Supreme Court. Yet upon the urging of the Attorney General, who was responsible for the litigation in this court, they decided to adopt the interim maps.

The decision to adopt the interim plans was not a change of heart concerning the validity of any of Plaintiffs' claims[40] in either this litigation or the D.C. Court litigation and was not an attempt to adopt plans that fully complied with the VRA and the Constitution—it was a litigation strategy designed to insulate the 2011 or 2013 plans from further challenge, regardless of their legal infirmities.[41]

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[40] *E.g.*, JX-5 (Bill Analysis of SB 1524 introduced by Sen. Seliger in the regular session) ("Though the Texas Legislature remains confident that the legislatively-drawn maps adopted in 2011 are fair and legal and comply with all provisions of federal law, there remain several outstanding legal questions regarding these maps that undermine the stability and predictability of the electoral process in Texas.")

[41] The evidence indicates that not only did the strategy originate in the Attorney General's office, but also the legislative fact findings accompanying the plans, before the Legislature had engaged in any fact findings on the bills. Tr1558 (Darby). The fact findings in the introduced versions of the bills included that the interim plans complied "with all federal and state constitutional provisions or laws applicable to redistricting plans." Later, when Sen. Zaffirini offered an amendment to remove the legislative findings, Seliger objected, asserting that the amendment "guts the bill." JX-24.4 at § I p. 13. The amendment failed. The Senate later agreed to remove the language from the Senate plan, which everyone agreed was lawful, but refused

The letter from then-Attorney General Abbott to Speaker Joe Straus makes the strategy clear: Abbott advised that the "best way to avoid further intervention from federal judges in the Texas redistricting plans" and "insulate the State's redistricting plans from further legal challenge" was to adopt the interim maps. Quesada-57; DX-858. Thus, Defendants sought to avoid any liability for the 2011 plans by arguing that they were moot, and sought to ensure that any legal infirmities that remained in the 2013 plans were immune from any intentional discrimination and *Shaw*-type racial gerrymandering claims.

Defendants knew that most Plaintiffs would maintain claims against the interim plans if adopted, despite the changes, and that such challenges might indicate that further changes to the maps were required. With regard to the interim plans, Abbott's letter does not say that the plans cure legal infirmities in the plan, only that they "have the approval from the federal judges overseeing this litigation." *Id.* Although this Court had "approved" the maps for use as interim maps, given the severe time constraints it was operating under at the time of their adoption, the Court clearly warned that its preliminary conclusions, which were based on the preliminary injunction "likelihood of success" standard, were not based on a full examination of the record or the governing law and were subject to revision.[42]

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to eliminate it from the House and congressional plan bills. Tr1558 (Darby).

[42] The Court noted, "It is especially difficult to determine whether a claim has a likelihood of success when the law is unsettled, as many areas of § 2 are." Docket no. 691 at 1-2. In addition, this Court was required to defer substantially to the legislative choices and district lines in Plan C185 and Plan H283, and emphasized that its

The Legislature's own attorney, Jeff Archer, advised them accordingly. JX-14.4 at 6-19; *id.* at 11 (noting that this Court was "in a little bit [of a] tricky [position] because the Court had not made full determinations, . . . had not made fact findings on every issue, had not thoroughly analyzed all the evidence but they had to make some best case guesses . . . ."); *id.* at 11-12 (the Court's caveats were "as if to say this is the best we can do now. We haven't gotten to the bottom of things."); *id.* at 12 (noting that the Court was not making final determinations, that the Court noted unsettled and difficult legal issues and factual disputes, and "essentially made it explicitly clear that this was an interim plan to address basically first impression of voting rights issues").[43] Given the remaining legal challenges and this Court's warnings that the interim maps were enacted without a full review of the facts or the law, a reasonable construction of this Court's orders leaves the definite possibility that, upon full review, additional changes would be required to the interim plans in response to legal infirmities.

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determinations were preliminary and made on an expedited basis. Although the Court endeavored under the time constraints to ensure that the plan contained no legal defects, it did not guarantee that to be the case, and in fact warned repeatedly that its determinations could change after a full trial on the merits.

[43] At a later committee hearing, Archer correctly explained this Court's position: this Court faced "a tension there between what they thought the Voting Rights Act required and what they thought the deference they had to give until they were sure what the Voting Rights Act required." JX-15.3 at 52. He also noted that "they could go into a lot more issues than they already have." *Id.* at 49.

Moreover, given the D.C. Court's findings of intentional discrimination, Defendants saw a very real possibility that this Court would likewise find that the 2011 plans were the product of discriminatory intent.[44] Rather than trying to cleanse the plans of continuing discriminatory intent or legal defect, Defendants' strategy involved adopting the interim maps, however flawed, arguing that the 2011 plans would never go into effect and thus could have no harmful effects, and arguing that the 2013 plans could have no impermissible intent such that, whatever possible or likely discriminatory or unconstitutional effects remained in those plans, Plaintiffs would have no remedy, and Defendants would maintain the benefit of such discrimination or unconstitutional effects. By arguing that there may have been intent but no effect in 2011 and there may have been effect but no intent in 2013, despite the fact that there is unquestionably both intent and ongoing effect, Defendants' actions in 2013 were attempting to prevent Plaintiffs from obtaining relief for purposeful racial discrimination.

In Defendants' view, Plaintiffs could obtain no relief for the Legislature's past discrimination in 2011, and any discriminatory intent and effects remaining in the 2013 plans, however harmful, would be safe from challenge.[45]

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[44] And they were aware that, even if the Supreme Court ruled in *Shelby County* that § 4's preclearance coverage formula was unconstitutional, such a finding of intentional discrimination could result in Texas being placed under § 5 through bail in.

[45] The Legislature did not believe that passing the interim maps would end the litigation. They knew that Plaintiffs would pursue claims against the interim maps, and they were informed by TLC attorney Jeff Archer that they had not realistically removed legal

This strategy is discriminatory at its heart and should not insulate either plan from review. *Cf. Kirksey v. Bd. of Sup'rs of Hinds Cty., Miss.*, 554 F.2d 139, 146-47 (5th Cir. 1977) ("Where a plan, though itself racially neutral, carries forward intentional and purposeful discriminatory denial of access that is already in effect, it is not constitutional. Its benign nature cannot insulate the redistricting government entity from the existent taint. If a neutral plan were permitted to have this effect, minorities presently denied access to political life for unconstitutional reasons could be walled off from relief against continuation of that denial.").

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challenges to the plans apart from those areas remedied by the interim plans. JX-14.4 at 18; *id.* at 19 (explaining that "challenges to both the Court drawn fixes as well as to the background districts that were not changed in any of the plans will go forward" and "the parties to the case will continue to press issues"); JX-15.3 at 56 ("I think it's fair to say by enacting the Court-ordered plan, you've put to bed . . . those issues that the Court identified so far. But I don't know that you put the rest to bed."). Despite knowing that Plaintiffs would continue to pursue relief, they sought to deprive Plaintiffs of a potential remedy. Further, because they felt their strategy would preclude any remedy and they wanted to maintain any partisan advantage obtained regardless of whether it was the result of intentional racial discrimination, they were not truly interested in fixing any remaining discrimination in the plan. Thus, although Darby kept stating that he wanted to be informed of legal deficiencies so he could fix them, he did not himself seek to have the plan evaluated for deficiencies and he willfully ignored those who pointed out deficiencies, continuing to emphasize that he had thought "from the start" that the interim plans were fully legal. JX-17.3 at S5. Defendants' strategy would leave Plaintiffs with § 2 effects claims only, and Defendants intended to continue vigorously opposing any plan with coalition districts, despite Fifth Circuit case law holding that such districts could be required. Tr1576-78 (Darby).

In sum, the Court concludes that the racially discriminatory intent and effects that it previously found in the 2011 plans carry over into the 2013 plans where those district lines remain unchanged. The discriminatory taint was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy. The Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans.

III. Dallas-Fort Worth area ("DFW") Claims

Plaintiffs brought § 2 results claims and intentional vote dilution claims, as well as Fourteenth Amendment racial discrimination claims against the DFW districts in Plan C185. Interim Plan C235 made significant changes to the DFW area to address the "not insubstantial" § 5 discriminatory purpose claims of packing and cracking. Plaintiffs alleged that CD30, the only minority district, was packed, while "fingers" from surrounding Anglo-majority districts reached into urban and suburban Dallas and Tarrant County areas to crack minority communities and subsume them in Anglo-dominated districts. As a result, despite its substantial minority population, the DFW metroplex had only one minority opportunity district (CD30) that performed for African Americans, and none for Latino voters.

To address the § 5 discrimination claims, Plan C235 included new CD33, spanning Dallas and Tarrant Counties. Plan C235 withdrew many of the encroachments into minority communities from the Anglo districts surrounding DFW, and the population left

behind in DFW from the removed encroachments was placed in new CD33, while accommodating congressional incumbents and taking into account population growth. Docket no. 691 at 36-37. In addition, the minority population of CD30 was decreased somewhat to address the packing allegations, with the Court noting that the H+BVAP of CD30 was 76.7% in the benchmark, 81.5% in Plan C185, and 75.9% in Plan C235. *Id.* at 37 & n.83.[46] Given the unsettled law and the inability to look at all the necessary factual evidence, the Court was unable to conclude at the time that Plaintiffs were likely to succeed on their § 2 claims premised upon coalition districts. It also found that the Task Force Plaintiffs were not likely to succeed on their claim that a Latino opportunity district was required because their proposed HCVAP-majority district (CD6 in Plan C190) was not compact.

In the Opinion on Plan C185, this Court found that Plaintiffs failed to prove their § 2 results claims in DFW because they failed to satisfy the first *Gingles* precondition for the Latino and coalition districts insofar as none of the proposed districts were compact. Docket no. 1390 at 58-92.[47] The Court did find that mapdrawers violated the Equal Protection Clause by improperly using race in drawing CD26 in violation of the *Shaw* line of cases. And, it found that mapdrawers acted with racially discriminatory intent and intentionally diluted minority

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[46] CD30 was also altered to address the intentional discrimination claims brought by African-American Congressperson Eddie Bernice Johnson, who represented CD30.

[47] However, Plaintiffs were not precluded from bringing § 2 results claims against Plan C235 based on the *Gingles* preconditions and the totality of circumstances in 2013.

voting strength in DFW by intentionally packing and cracking minorities. Docket no. 1390 at 146. Specifically, the Court found that minorities were moved into CD30 to waste their votes, while Anglo voters were moved out of CD30 and into neighboring districts to shore them up as Republican districts, and that mapdrawers drew and then divided a proposed minority district in the DFW area to minimize current and future minority voting power.

The Plaintiffs' packing and cracking intentional discrimination/dilution claim in this case is essentially the same "not insubstantial" § 5 discriminatory purpose claim that the Court attempted to remedy in Plan C235, but certain Plaintiffs complain that the discrimination is not fully remedied. They contend that packing and cracking remain, intended to prevent the emergence of an additional minority district or districts. Plaintiffs assert that two or three minority opportunity districts are required in addition to CD30 and that the DFW configuration intentionally limits minority opportunity to two districts when more opportunity districts can easily be drawn. The Quesada Plaintiffs further contend that the Legislature intentionally discriminated by knowingly reaffirming discriminatory features identified by the D.C. Court, including specifically the cracking of minority populations in Arlington and Grand Prairie.

As explained in the Court's order adopting Plan C235, CD33 was not intentionally drawn as a minority coalition district under § 2. Rather, it was created to remedy the alleged intentional discrimination (cracking) claims by removing the fingers from the Anglo-majority districts that reached into Dallas and Fort Worth. However, it is majority-minority CVAP when Black and Hispanic CVAP are combined, and it has elected an African-American,

Marc Veasey. It has thus performed as a minority coalition district under most Plaintiffs' view that such districts require minority cohesion only in the general elections.[48] On this basis, the Court concluded in its Order on Plan C185 that Plaintiffs' claims that one minority coalition district was required in DFW (in addition to African-American district CD30) were moot.

However, Plaintiffs continue to assert that more minority opportunity districts are required in DFW, especially one that can elect a Latino candidate of choice in the primary and general elections, to reflect the Latino growth in the area. Certain Plaintiffs contend that CD33 does not provide Latino opportunity because of its failure

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[48] The Task Force does not share this view, but the Task Force also has not sought the creation of any coalition districts in DFW. Rather, the Task Force sought only the creation of an HCVAP-majority Latino opportunity district. However, the Task Force's proposed district (CD6 in Plan C190) was not compact, and because of the dispersion of Latinos among African Americans, a compact HCVAP-majority district cannot be drawn in DFW using 2011-2015 ACS data.

Other Plaintiffs did seek the creation of a coalition district in DFW, however. And although several of these Plaintiffs (except the Rodriguez Plaintiffs) now contend that CD33 is not a coalition opportunity district but an African-American opportunity district because African-American voters are controlling the Democratic primaries, these Plaintiffs also contend that coalition opportunity for purposes of a *Gingles* results claim should be determined by the general elections, not primaries. Thus, their prior claim that one coalition district was required in DFW under the § 2 results test was mooted by the drawing of a district that performs as a coalition district in the general election.

to elect the Latino-preferred candidate in the primary despite its HCVAP.[49]

Defendants contend that (1) there is no evidence of dilutive intent in 2013, (2) no single-minority-majority-CVAP district can be drawn and coalition districts are not required by § 2, and (3) even if coalition districts were required, the record refutes the existence of cohesive voting between Hispanic and African-American voters in the DFW area, as shown primarily by the results of Democratic primaries. Docket no. 1526 at 81-82. The Court has already rejected Defendants' position that coalition districts can never be required by § 2, and does not repeat its analysis here. And the doctrine of constitutional avoidance counsels that this Court should address the statutory § 2 effects claim before analyzing Plaintiffs' constitutional claim. The Court thus considers whether Plaintiffs have satisfied the *Gingles* criteria.

Plaintiffs[50] agree that, despite the strong minority population growth in DFW, it is not possible to draw an

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[49] The Rodriguez Plaintiffs do not challenge CD33 itself, but contend that its configuration "demonstrates the tortured lines the State had to draw in order to avoid creating an additional opportunity district for minorities in Texas." Docket no. 1524 at 24 n.21. They assert that it does not fix the cracking and packing this Court found in DFW under Plan C185 or "mask the hallmarks of intentional discrimination that persist in DFW under Plan C235," but "only highlights and perpetuates the State's consistent approach of cracking minority populations in DFW to avoid what would otherwise be inevitable: increased electoral opportunities for minority voters." *Id.*

[50] In this section, "Plaintiffs" generally refers to Plaintiffs other than the Task Force. Presumably the Task Force Plaintiffs, who previously argued that their proposed HCVAP-majority district was compact, do not agree that no compact HCVAP-majority can be

additional compact single minority-majority CVAP district. This is due primarily to the fact that minority populations are interspersed with each other, although these mixed minority populations are geographically concentrated. As a result, each of the proposed demonstration maps creates new minority coalition districts. The Court did not reach the issue of minority cohesion in proposed coalition districts in its prior orders because Plaintiffs did not clear the first *Gingles* hurdle. But the issue is now squarely presented. The Court acknowledges that the evidence presented in this case cuts both ways and the decision is close, but the Court concludes that Plaintiffs have not proved the necessary cohesion.

A. § 2 Results Claims

Gingles 1

Plaintiffs' demonstration plans C284 (NAACP), C273 (Quesada), and C286 (Rodriguez) generally take the same approach and create one additional minority coalition district (in addition to maintaining CD30 and CD33 as minority opportunity districts). Existing CD33, which spans Dallas and Tarrant Counties, is pushed entirely into Tarrant County and made much more compact. It remains a B+HCVAP-majority district, but its HCVAP is decreased and its BCVAP increased.[51] CD30, the

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drawn in DFW. In addition, the Task Force Plaintiffs have asserted no claims against DFW in Plan C235.

[51]In Plan C235, it is 43.6% HCVAP and 23.7% Black Alone CVAP. In Plan C273, it is 23.4% HCVAP and 30.8% Black Alone CVAP. In Plan C284, it is 22.8% HCVAP and 29.4% Black Alone CVAP. In Plan C286, it is 24.6% HCVAP and 30% Black Alone CVAP.

existing BCVAP-majority opportunity district, generally maintains a similar location wholly within Dallas County, and its BCVAP remains above or near 50%.[52] The maps create the new coalition district in between CD30 and CD33, and each district has a combined H+BCVAP above 50%.[53] Thus, each district satisfies the numerosity threshold, and all three demonstration maps contain one more minority-majority district in DFW than does Plan C235.[54] In addition, based on a review of all the evidence, the Court finds that these districts reflect compact minority communities, including the various mixed-minority cities and neighborhoods within the DFW metroplex and respecting traditional redistricting principles and non-racial communities of interest.[55] *See*

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[52] In Plan C235, CD30 is 53.2% BCVAP. In Plan C273, it is 49.8% Black Alone CVAP but 50.4% combined BCVAP. In Plan C284, it is 50% Black Alone CVAP and 50.6% combined BCVAP. In Plan C286, it is 54% BCVAP.

[53] In Plan C273, proposed CD3 is 38.4% HCVAP and 19.6% Black Alone CVAP. In Plan C284, proposed CD24 is 39.8% HCVAP and 19.1% Black Alone CVAP. In Plan C286, proposed CD24 is 36.1% HCVAP and 18.7% Black Alone CVAP.

[54] MALC Plan C285 creates an additional coalition district to the east of CD30.

[55] Given its conclusion on cohesion, the Court finds it unnecessary to detail all of the evidence here. But it notes that Dr. Ansolabahere did not set out to draw minority districts in Plan C286, but sought to adhere to municipal boundaries and compactness principles and to avoid dividing minority populations; as a result, his CD24 encompasses the adjacent, majority-minority cities of Irving and Grand Prairie and adds western Dallas and the City of Farmers Branch. CD30 retains its relatively compact shape and includes southern and eastern Dallas and all of the smaller municipalities to the south inside Dallas County. CD33 respects county lines by remaining wholly within Tarrant County and includes population

LULAC v. Perry, 548 U.S. 399, 433 (2006) (recognition of nonracial communities of interest reflects the principle that a state may not assume that members of the same race will share the same political interests and prefer the same candidates).

2. *Gingles* 2

Minority political cohesion is the second *Gingles* precondition, and is the focus of the parties' disagreement in this phase of the litigation. The purpose of this inquiry is "to ascertain whether minority group members constitute a politically cohesive unit." *Gingles*, 478 U.S. at 56. *Gingles* states that "[a] showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and, consequently, establish[ing] minority bloc voting within the context of § 2." *Gingles*, 478 U.S. at 56 (citation omitted). The Supreme Court in *Gingles* did not say that primary cohesion was required, but did note that political cohesiveness of black voters was clearly established where "black voters' support for black candidates was overwhelming in almost every election. In all but 5 of 16

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from Fort Worth and Arlington. Its northwestern protrusion somewhat tracks that in Plan C235 but widens the neck and avoids splitting Sansom Park. The northeastern portion is widened and eliminates the protrusion into Forth Worth, and includes all of eastern Arlington rather than the precisely cut out areas in Plan C235. Further, it follows the general contours of CD33 in Plan C235 along the eastern edge of Fort Worth, but follows the Fort Worth municipal boundary on the eastern side instead of leaving small areas out of the district as in Plan C235. The Court further relies on Dr. Fairfax's analysis of NAACP Plan C284 and testimony from lay witnesses Franklin Moss and Rep. Toni Rose.

primary elections, black support for black candidates ranged between 71% and 92%; and in the general elections, black support for black Democratic candidates ranged between 87% and 96%." *Id.* at 59.

The Supreme Court has not offered specific guidance on proving cohesion in a coalition context, other than to say that "when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential" and there is a "higher-than-usual need for the second of the *Gingles* showings." *Growe v. Emison*, 507 U.S. 25, 41 (1993). This indicates that proof of cohesion is essential for coalition claims, but does not indicate that the standard for proving such cohesion is necessarily any different for coalitions than for single minorities.

In *Campos v. City of Baytown*, Tex., 840 F.2d 1240, 1244 (5th Cir. 1988), the Fifth Circuit held that, "[t]o prove the fact of their electoral dilution, plaintiffs must prove that the minorities so identified actually vote together and are impeded in their ability to elect their own candidates by all of the circumstances, including especially the bloc voting of a white majority that usually defeats the candidate of the minority." It noted that "the central focus" for the cohesion inquiry is upon voting patterns, and a minority group is politically cohesive if it votes together. *Id.* The court continued,

> the proper standard is the same as *Gingles*: whether the minority group together votes in a cohesive manner for the minority candidate. . . . The key is the minority group as a whole. Of course, if one part of the group cannot be expected to vote with the other part, the combination is not

> cohesive. If the evidence were to show that the Blacks vote against a Hispanic candidate, or *vice versa*, then the minority group could not be said to be cohesive. But if the statistical evidence is that Blacks and Hispanics together vote for the Black or Hispanic candidate, then cohesion is shown.

Id. at 1245 (footnote omitted). *Campos* does not specify in which election this voting pattern is relevant or necessary, and it does not mention primaries.

In *Overton v. City of Austin*, 871 F.2d 529, 544 (5th Cir. 1989), the Fifth Circuit looked at whether black and Mexican-American voters "usually combine[d] to support candidates who were usually disfavored by Anglo voters," but there was no discussion of primary elections.

In *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989), the court considered cohesion among Hispanics, African Americans, and Asians in school board member elections and stated, "The determinative question is whether black-supported candidates receive a majority of the Hispanic and Asian vote; whether Hispanic-supported candidates receive a majority of the black and Asian vote; and whether Asian-supported candidates receive a majority of the black and Hispanic vote in most instances in the KISD area." *Id.* at 453 (citing *Campos*, 840 F.2d at 1244-45). There was no statistical evidence from the plaintiffs, and lay witness testimony differed on political cohesion among these groups. One expert's multivariate regression analysis showed African Americans and Hispanics were in direct opposition in most KISD elections in which minority candidates ran, and this evidence was unrebutted. The Court found that cohesion was lacking.

This case sheds no specific light on the primary issue, however.

In *Session v. Perry*, 298 F. Supp. 2d 451, 478 (E.D. Tex. 2004), the district court rejected plaintiffs' coalition claim in DFW because "there is no serious dispute but that Blacks and Hispanics do not vote cohesively in primary elections, where their allegiance is free of party affiliation."[56] On appeal, the Supreme Court did not consider whether such lack of primary cohesion was important, instead "[a]ccepting . . . that African-Americans do not vote cohesively with Hispanics." *LULAC v. Perry*, 548 U.S. 399, 443 (2006). It accepted this fact to decide the question presented on appeal, which was not whether African Americans and Hispanics were politically cohesive, but whether African Americans had effective control of CD24, even though African Americans made up only 25.7% of the district's CVAP. The plaintiffs argued that they could control the district because they were 64% of voters in the Democratic primary, and that their control of the primary translated into effective control of the entire election.

The district court rejected the argument that African Americans could control the primary because the district was drawn for an Anglo Democrat (Frost), who had no opposition in any primary since his incumbency began,

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[56] The district court also stated that, even assuming Blacks and Hispanics vote cohesively, they must disprove partisanship as the driving force behind the bloc voting, citing *LULAC v. Clements*, 999 F.2d 831, 850 (1993) (en banc). *Session*, 298 F. Supp. 2d at 478 n.88. The parties in this case vigorously dispute the application of *LULAC v. Clements* and whether the role of partisanship must be disproved as a cause of racial voting behavior. Because the Court does not find cohesion, it does not address this dispute.

and CD24's demographics were similar to another district where an African-American candidate failed when he ran against an Anglo. Instead, the district court found that the district was controlled by Anglo Democrats. On appeal, the Supreme Court found no clear error in this finding, stating that the lack of any contested Democratic primary over the last 20 years left "no obvious benchmark . . . for deciding whether African-Americans could elect their candidate of choice." *LULAC*, 548 at 444. It continued,

> The fact that African-Americans voted for Frost—in the primary and general elections—could signify he is their candidate of choice. Without a contested primary, however, it could also be interpreted to show (assuming racial bloc voting) that Anglos and Latinos would vote in the Democratic primary in greater numbers if an African-American candidate of choice were to run, especially given Texas's open primary system. The District Court heard trial testimony that would support both explanations, and we cannot say that it erred in crediting the testimony that endorsed the latter interpretation.

LULAC, 548 U.S. at 444. The Court continued,

> The opportunity "to elect representatives of their choice," requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice. There is no doubt African-Americans preferred Martin Frost to the Republicans who opposed him. The fact that African-Americans preferred Frost to some others does not, however, make him their candidate of choice. Accordingly, the ability to aid in Frost's

> election does not make the old District 24 an African-American opportunity district for purposes of § 2. If § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.

Id. at 445-46 (internal citations omitted).

Defendants contend that this language is dispositive of the issue of the role of primaries in cohesion, and that without evidence of cohesion in contested primaries, no coalition claim can be proved. But the Supreme Court did not consider the issue of minority cohesion at all. The Court looked only to the factual question of whether African-Americans actually had the ability to control outcomes in the district, and that fact could not be determined without showing ability to control the primaries. African-American voters were turning out in greater numbers than others in the primary. While this was de facto control, it did not translate into actual control of the primary, because the primary was uncontested—Anglo voters who controlled the district and originally sponsored Frost simply did not feel the need to turn out in the primary because their preferred candidate would emerge regardless. If an African-American (or presumably, African-American-sponsored but not necessarily African-American) candidate did run in the primary, there was no guarantee that candidate would win because African-American voters could be easily outnumbered.

Thus, even though African Americans were voting for Frost in both the primary and the general elections, this did not automatically make Frost their candidate of

choice. The evidence credited by the courts showed it was likely that they were merely voting for the candidate they were permitted to vote for by the Anglos who controlled the district. Thus, because they could not show that they actually controlled the district, as opposed to simply voting along with Anglos who in fact controlled the district, their claim failed.

This discussion in *LULAC* highlights the intensely local and factual appraisal required by § 2 claims, and it indicates that primaries can aid courts in determining voters' candidates of choice—not only by considering who voters are voting for in the primaries (which is relevant to which candidates they prefer), but considering all the relevant circumstances. *LULAC* supports the conclusion that primaries should not be excluded from the minority cohesion analysis, but it does not answer the question of the weight to be given particular primary voting patterns in determining cohesion in this case.

Thus, the current case law from the Fifth Circuit and Supreme Court confirms that primaries are relevant, but provides little guidance on their probative value. Cases outside the Fifth Circuit take conflicting views. In *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 421 (S.D N.Y.), *aff'd*, 543 U.S. 997 (2004), the court held that when the two minority groups are generally affiliated with the same party and vote for that party's candidates at high rates, primaries are by far the most probative evidence of cohesion. The court relied on lack of primary cohesion and "the fact that the plaintiffs have presented cohesion evidence for a very limited portion of their proposed district" to find that plaintiffs failed to prove Black-Hispanic political cohesion. *Id.* at 422.

In contrast, the D.C. Court in the § 5 preclearance litigation rejected Texas's reliance on primaries in considering HD149 in the Houston area. It noted that there was persuasive evidence of both concerted efforts among a coalition to elect its preferred candidates and a pattern of success extending across multiple election cycles. *Texas v. United States*, 887 F. Supp. 2d 133, 174 (D.D.C. 2012). Texas argued that the minority groups "do not vote cohesively in primaries and only come together to agree on a second- or third-best candidate in time for the general election" and "this does not prove an effective coalition district." *Id.* The D.C. Court stated,

> We agree that evidence of shared voting preferences at the primary level would be powerful evidence of a working coalition, but it is not needed to prove cohesion. In the first place, there is little support for Texas's focus on primary elections. Texas cites *LULAC* for this point, but *LULAC*, a section 2 case, only talks about primaries as a method to determine one minority group's candidate of choice; it says nothing about the need for two groups in a putative coalition to vote cohesively in a primary. More importantly, it does not hold that evidence of cohesion in a primary is necessary to identify a candidate of choice. The same is true here, where there has been no contested endogenous Democratic primary since 2004, when Rep. Vo first won his seat. Texas also cites two district court cases that rely on primary cohesion, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 421 (S.D.N.Y. 2004); and *Session v. Perry*, 298 F. Supp. 2d 451, 478 (E.D.Tex. 2004), but these cases

represent the minority view. Most courts to address this issue have expressed no preference about the election level at which voting cohesion must be shown. *See, e.g., Lewis v. Alamance Cnty.*, 99 F.3d 600, 615 (4th Cir. 1996); *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 886 (5th Cir. 1993) (en banc); *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 276 (2d Cir. 1994), *vacated and remanded on other grounds*, 512 U.S. 1283, 115 S.Ct. 35, 129 L.Ed.2d 931 (1994).

We agree with the majority view. Courts regularly consider general election data to demonstrate voter cohesion in traditional majority-minority districts, without any indication that such a showing is insufficient without evidence of voter cohesion in the primary as well. Additionally, requiring cohesion in the primary election distorts the role of the primary. Although minority groups sometimes coalesce around a candidate at that point in time, minority voters, like any other voters, use the primary to help develop their preferences. We refuse to penalize minority voters for acting like other groups in a political party who do not coalesce around a candidate until the race is on for the general election. *See Alamance Cnty.*, 99 F.3d at 614-16 ("We reject the proposition that success of a minority-preferred candidate in a general election is entitled to less weight when a candidate with far greater minority support was defeated in the primary.... [S]uch a view is grounded in the belief that minority voters

> essentially take their marbles and go home whenever the candidate whom they prefer most in the primary does not prevail, a belief about minority voters that we do not share." (citation and internal quotation marks omitted)). "Pull, haul, and trade" describes the task of minority and majority voters alike, and candidates may be minority "candidates of choice" even if they do not "represent perfection to every minority voter."

Texas, 887 F. Supp. 2d at 174-75 (some citations omitted).[57]

Plaintiffs argue that they have shown the required cohesion in DFW through expert and lay testimony. Plaintiffs and their experts assert that the relevant focus is on which party primaries minorities choose and their general election cohesion, and that a lack of cohesion in

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[57] The Court notes that *Lewis v. Alamance County*, 99 F.3d 600 (4th Cir. 1996) was not a case about minority cohesion. Rather, the Fourth Circuit was evaluating whether the district court properly determined that the plaintiffs had failed to show that black-preferred candidates were usually defeated. In that regard, the plaintiffs argued that Democrats should be treated as black-preferred only if they were also black-preferred in the primary. The Fourth Circuit rejected that argument, holding that candidates who receive strong black support in general elections are the black-preferred candidate in that election, regardless of their level of support in the primary, and the elections should be counted accordingly in the determination of whether black-preferred candidates were usually defeated. *Id.* at 615. The Court also held that primary elections and general elections must be analyzed separately to determine whether black-preferred candidates were usually successful, to be sure that the regular defeat in one of these phases would not be masked by repeated successes in the other. *Id.* at 615. If anything, this case supports the argument that a court considering cohesion should also look at primaries.

the primaries should be considered irrelevant or, if relevant, should not undermine a finding of cohesion. They note that Defendants' expert, Dr. Alford, admitted that one way for minorities to show that they are politically cohesive is to coalesce around a major political party. Tr1443. Defendants, on the other hand, argue that focusing on the Democratic primaries is essential, and that Plaintiffs cannot establish minority political cohesion without proof of primary cohesion. Their expert, Dr. Alford, has consistently opined that "Blacks and Hispanics do not vote cohesively in either party [primary], and in fact are more likely than not to oppose each other's preferred candidates." Alford 2014 Supp. Report at 15.

Plaintiffs' experts offered various bases for their positions that the key focus should be on general election cohesion. These were generally that: (1) the general elections are the "key" or operative contests for electing candidates of choice; (2) the general elections involve many more voters and primary participation is small; (3) primary voters do not accurately reflect the voting population and are "skewed," and may even involve members of the other party because Texas has open primaries; (4) primary voting may be strategic wherein voters vote for second or third choice candidates because they believe they have a better chance at success in the general election. *See* docket no. 1340 ¶¶ 700-702; Tr1052, Tr1203-05 (Ansolabahere); Tr410-11 (Chervenak); Tr98, Tr114-15 (Brischetto). All of these factors affect the probative value of primary elections, but they do not require us to ignore primary elections altogether. As Dr. Alford explains, primaries reflect actual voting behavior, still involve a significant number of voters, and are an integral part of the process leading to election of

candidates. Tr1364, Tr1461. Because the most pertinent indicator of political behavior is voting behavior, this Court finds that primary elections should be considered as part of the minority group's overall voting behavior, but will give the primaries the weight the evidence shows that they deserve.

This Court previously made certain fact findings relevant to the issue of cohesion. The Court noted that there is a strong correlation between partisanship and ethnicity in current Texas politics, and that African Americans and Latinos have tended to identify with the Democratic party in recent years due to shared issues, lack of Republican vote courting, and the rise of the Tea Party, while more Anglos have shifted to the Republican party. Docket no. 1340 ¶¶ 678, 681. This has been more true for Latinos in recent years because Republicans have not done a very good job of reaching out to Latinos and some party positions on immigration do not attract Latinos. *Id.* ¶ 680. African Americans and Latinos share many common interests and generally feel that the Democratic party is more responsive to those interests.

Evidence from prior phases of this litigation consistently showed that, statewide, African Americans and Latinos choose to participate in Democratic primaries rather than Republican primaries[58] and consistently support the Democratic candidates in general elections,

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[58] Docket no. 1340 ¶ 683 ("There is almost no African-American voter participation in the Republican primaries, and very little Hispanic participation."); *id.* ¶ 684 ("Dr. Lichtman found that Latino and African-American voters in Texas are cohesive in that both voter groups overwhelmingly choose to participate in Democratic rather than Republican primaries.").

regardless of their race. Docket no. 1340 ¶¶ 688, 696, 697, 706.[59] However, in the Democratic primaries originally studied by Dr. Engstrom (primaries for statewide offices in 2008 and 2010), he found that non-Latinos (which included both African American and Anglo voters) did not consistently share the candidate preferences of Latino voters. African-American voters shared support for only one of five primary candidates preferred by Latinos in Dallas and Tarrant Counties. Docket no. 1340 ¶ 685.

In his corrected Rebuttal report, Engstrom found that Latino voters were very cohesive in their preferences for Latino candidates in Democratic primaries but African-American support for Latino-preferred candidates was not typically present in primaries and, in fact, African-American voters had "a distinct tendency to vote for candidates competing with the candidates preferred by Latinos in primary elections." *Id.* ¶ 686. Dr. Alford also concluded that African-American and Hispanic voters are not generally cohesive in the Democratic primary, and that the polarization is based on the ethnicity of the candidates such that a "Black candidate will not typically be the candidate of choice of Hispanic voters in the Democratic primary" and "the Hispanic candidate will typically not be the candidate of choice of Black voters in the Democrat primary." *Id.* ¶ 687. Kousser also found that Latinos and African Americans were not cohesive in the

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[59] This trend was so strong that Dr. Alford assessed whether districts were minority opportunity districts by looking at Democrat wins/losses and noted that in Texas, minority candidates of choice means Democrats. Docket no. 1340 ¶ 688. In this phase of the litigation, many of Plaintiffs' experts have taken a similar approach in assessing performance for minority districts.

Democratic primary, with Latinos voting for Latino candidates but African Americans not tending to support Latino candidates in the 2010 Democratic primaries. *Id.*

Based on all the prior evidence, this Court found that in general, Hispanic voters are politically cohesive in general and primary elections, African-American voters are politically cohesive in general and primary elections, Latinos and African Americans are often *not* cohesive within the Democratic primary, and African-American and Latino voters are politically cohesive in general elections in support of the Democratic candidate, regardless of the candidate's race. Docket no. 1340 ¶¶ 703-706. However, *Gingles* requires a local appraisal for minority cohesion. *See Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) ("Our recent opinion in *Overton v. City of Austin* cautions against reaching conclusions about inter-minority cohesion absent a diligent inquiry into the political dynamics of the particular community.").

It is undisputed that African-American and Latino voters show very high rates of cohesion in general elections in Texas in general and specifically in Dallas and Tarrant Counties. Dr. Ansolabahere testified that, based on his analysis, African-American and Latino voters vote cohesively in the general elections to elect their preferred candidates. Tr1201; Rod-955 (Table 9) (in Dallas County and Tarrant County Black support for Democratic candidates was estimated at 100%, while Latino support ranged from 68.4% to 81.7% in Dallas County and 71.5% to 80.6% in Tarrant County). Dr. Lichtman's ecological regression analysis found near-perfect cohesion in support of the Democratic candidate between African American and Latino voters in the five 2008 and 2010 general elections he studied: In Tarrant County both

estimates were 100% and in Dallas County both estimates were 99%. Joint Expert Ex. E-3 Table 2.

Dr. Engstrom previously found that Latinos in Dallas County supported the Latino candidate at high levels, between 81.1 and 88% and African-American support was over 90% in all general elections. Docket no. 307-1 at 13. In Tarrant County, Dr. Engstrom found that Latinos supported the Latino candidate at high levels, between 84.3 and 98.3%, and African-American support was above 90% in all elections. Docket no. 307-1 at 18-19. Dr. Engstrom's 2017 analysis reveals that this trend generally continued in 2014 and 2016. TF-19. In Dallas County, Latinos supported Latino Democrat candidates at rates of 78.3, 73.4, and 87.2% and African Americans at 95.5, 94.9, and 92.9%. In Tarrant County, Latinos supported Latino Democrat candidates at rates of 81.2, 78.6, and 88.1%, and African Americans at 92.7, 92, and 92.4%. TF-19.

Chervenak's racially polarized voting analysis of recent elections within Dallas County and Tarrant County also found high levels of cohesion, with each group supporting candidates from both racial groups, and other voters not sharing their preferences. NAACP-2 at 6-8; Tr105 (Brischetto) ("The minority candidate of choice in the general elections have been the Democratic candidate in each case.").

It is also undisputed that African Americans and Latinos primarily choose to participate in Democratic primaries. With regard to choice of primary, Dr. Lichtman previously looked at individual counties. Joint Expert Ex. E-3. In Dallas County, he found that African Americans participated in the 2008 Democratic Primary at a rate of 97.52% and Latinos at a rate of 88.72%. African

Americans participated in the 2010 Democratic Primary at a rate of 90.43% and Latinos at a rate of 59.21%. In Tarrant County, he found that African Americans participated in the 2008 Democratic Primary at a rate of 96.33% and Latinos at a rate of 83.54%. In the 2010 Democratic Primary, African Americans participated at a rate of 81.25% and Latinos at a rate of 31.66%. Lichtman noted that the lower Latino participation in 2010 was likely due to relatively small numbers of Latino voters participating at all, and there was much lower Hispanic participation in Democratic primaries in 2010 than 2008, while Hispanic participation in Republican primaries remained relatively constant. Joint Expert Ex. E-3 at 5-6, Table 1. Dr. Engstrom also noted that "[t]he number of Latinos receiving ballots in the 2014 Democratic primary substantially exceeded those in the Republican primary that year." TF-19 at 6 n.2 (in Dallas County, 6,859 Democrat and 3,579 Republican, in Tarrant County 5,816 Democrat and 4,108 Republican).[60]

However, Defendants contend that, without proving cohesion in the Democratic primaries, Plaintiffs cannot establish *Gingles* 2 for coalition districts. As noted, though African Americans and Latinos are choosing to vote in the Democratic primaries, they are often not cohesive in Democratic primaries, and that remains true

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[60] Dr. Lichtman's analysis of participation in the 2008 and 2010 Democratic primaries showed that many more African Americans vote in the primaries than do Latinos: In 2008 in Dallas County, 37,859 Hispanics voted while 86,528 African Americans voted. In 2010, 6,771 Hispanics voted while 23,522 African Americans voted. In 2008 in Tarrant County, 24,472 Hispanics voted while 36,116 African Americans voted. In 2010, 2,239 Hispanics voted, while 6,988 African Americans voted. Joint Expert Ex. E-3 Table 1.

in certain Democratic primaries in Tarrant and Dallas Counties. Dr. Engstrom previously analyzed statewide elections in 2006, 2008, and 2010, and found that African Americans were "the least likely group [between African Americans and 'others'] to support Latino candidates in Democratic primaries" in Dallas County and that African Americans supported the Latino candidate in only one of six primaries in Tarrant County. Docket no. 307-1 at 15, 20-21, Tables 5 & 7. There were no Democratic primaries in 2012 that met his inclusion criteria. Dr. Engstrom performed an updated primary analysis in 2017, but it includes only the 2010 Democratic primary for Governor with two candidates, Latino Reynaldo Madrigal and Anglo Wendy Davis. Madrigal was not the choice of Latino voters or African-American voters in either Dallas or Tarrant County, though he received higher Latino support (30.9% in Dallas County and 26.5% in Tarrant County) than African-American support (1.9% in Dallas County and .2% in Tarrant County). TF-19. Dr. Alford casts this primary as non-competitive and suggesting "at most that in a very non-competitive contest, the winning Anglo candidate was the choice of Anglos, Blacks, and Hispanics." D-878 (Alford 2017 Report) at 10.

The results of Dr. Engstrom's analyses for Democratic primaries in Dallas and Tarrant Counties are set forth in the following tables:

Dallas County

	African American voters	Latino voters	Other voters
2006 Dem. Primary Lt. Gov. (Alvarado)	27.2 24.5 - 29.9	50.5 46.6 - 54.5	43.2 41.4 - 45.0
2006 Dem. Primary Lt. Gov. Runoff (Alvarado)	34.8 31.8 - 37.6	60.2 52.2 - 68.7	43.4 40.6 - 46.3
2008 Dem. Primary US Senate (Noriega)	44.1 42.6 - 45.6	73.8 71.2 - 76.4	54.0 52.8 - 55.2
2008 Dem. Primary Sup. Ct. Pl. 7 (Cruz)	27.6 26.3 - 28.8	75.8 73.6 - 78.0	30.6 29.6 - 31.7
2008 Dem. Primary Sup. Ct. Pl. 8 (Yanez)	52.7 51.4 - 53.9	87.8 85.9 - 89.7	44.3 43.1 - 45.4
2010 Dem. Primary Lt. Gov. (Chavez-Thompson)	47.0 45.3 - 48.8	77.6 74.3 - 81.0	31.5 30.0 - 32.9

2010 Dem. Primary Land Comm'r (Uribe)	27.2 25.1 - 29.2	64.6 60.6 - 68.9	51.7 50.0 - 53.4
2014 Dem. Primary Governor (Madrigal)	1.9 0.8 - 3.2	30.9 26.4 - 34.7	2.7 1.5 - 4.0

Tarrant County

	African American voters	Latino voters	Other voters
2006 Dem. Primary Lt. Gov. (Alvarado)	30.8 25.5 - 35.8	46.2 39.0 - 53.5	45.3 43.1 - 47.5
2006 Dem. Primary Lt. Gov. Runoff (Alvarado)	30.4 25.5 - 35.1	66.1 56.4 -76.6	47.5 44.9 - 50.1
2008 Dem. Primary US Senate (Noriega)	66.0 63.4 - 68.7	72.4 68.2 - 76.9	51.5 50.5 - 52.5
2008 Dem. Primary Sup. Ct. Pl. 7 (Cruz)	27.6 24.2 - 30.9	79.4 74.2 - 85.1	31.2 30.0 - 32.4

2008 Dem. Primary Sup. Ct. Pl. 8 (Yanez)	42.2 38.9 - 45.5	85.0 80.6 - 89.6	40.5 39.4 - 41.7
2010 Dem. Primary Lt. Gov. (Chavez-Thompson)	42.9 38.5 - 47.2	73.3 67.3 - 79.7	39.6 38.3 - 41.0
2010 Dem. Primary Land Comm'r (Uribe)	24.1 19.1 - 28.8	64.3 57.1 - 72.0	35.4 33.8 - 36.9
2014 Dem. Primary Governor (Madrigal)	0.2 0.1 - 0.5	26.5 22.9 - 29.9	1.7 1.0 - 2.5

Dr. Chervenak examined the 2012 Democratic primary for HD 101 in Tarrant County. NAACP-2 at 8, 17. His analysis showed that the black candidate (Barnett) "was not the preferred candidate of either black or Latino voters." *Id.* at 8. At trial, Plaintiffs' counsel elicited testimony from Dr. Alford that neither group preferred the black candidate and "they're voting for the same candidate." Tr1477-78 (Alford); NAACP-2 at 8, 17. However, Dr. Chervenak's analysis does not indicate whether and to what extent black and Latino voters coalesced in support of a candidate because there were two other candidates in addition to the black candidate.

The NAACP and African-American congresspersons note that, as shown in NAACP-46, there were many Democratic primary races in Dallas County in 2016 where Latino and African-American candidates were uncontested by members from the other race.

Dr. Alford notes that, in the current phase, the evidence relevant to minority cohesion in the Democratic primaries comes primarily from Dr. Engstrom. Reviewing that evidence, he concludes, as did Engstrom in his earlier report, that "they do not show Black-Hispanic cohesion, but instead, if anything, suggest opposition." D-878 at 10. He further notes that, aside from Engstrom's reports, there is "very little from the remaining [experts] that informs the question of cohesion in proposed coalition districts." *Id.* at 11. While Dr. Chervenak did include endogenous primaries, despite his position that only statewide general elections should be considered (due to a lack of sufficient elections), Alford notes that these only examine existing districts, and do not purport to demonstrate cohesion in primary elections in proposed districts.

Defendants further focus heavily on the primaries in HD90 in Tarrant County and CD33. Dr. Engstrom examined the 2012 HD90 Democratic primary using multivariate ecological inference. PL-967 at 7. He found 65.7% Latino support, 37.7% African-American support, and 30.2% non-minority support for the Latino candidate Carlos Vasquez against Anglo incumbent Lon Burnam. *Id.* at 7-8. There were 3,987 votes cast in the primary, and Vasquez lost by 159 votes: 2,073 to 1,914. *Id.* at 8. In the 2014 Democratic primary in HD90, Dr. Engstrom found Latino support for Romero was 78.2%, while African-American support was 12.6% (and other voters 24.3%).

TF-19 at 11, Table 4. There were 5,078 votes cast in the primary, and Romero won with 51.08% (2,594 votes). This race did not show cohesion between Latinos and African Americans. Tr433-34 (Chervenak). HD90 overlaps significantly with Plaintiffs' proposed CD33 in Tarrant County.

Defendants note that Hispanic and African-American voters did not support the same candidate in the 2012, 2014, or 2016 Democratic primaries in CD33. Tr1368-71 (Alford). Current CD33 areas would be included in Plaintiffs' proposed coalition districts. In the 2012 primary, CD33 was an open seat, and African-American Marc Veasey and Hispanic Domingo Garcia both sought the nomination. It appears undisputed that both were viable candidates. CD33 spans Dallas and Tarrant Counties; Veasey was from Fort Worth/Tarrant County, and Garcia was from Dallas. TrA1401 (Murray). Alford estimated that 77.9% of Hispanic voters supported Garcia, while 85% of African-American voters supported Veasey, "exhibiting fairly cohesive support for opposite candidates." Tr1367-68 (Alford); D-424 at 17; DX-883. Dr. Murray felt that both race and the county "home factor" affected voting in the runoff because each candidate won his home county, and Veasey did not receive much black support in Dallas County. TrA1401 ("There wasn't much turnout, and he didn't win it by much; whereas, he did very, very well in his home county of Tarrant. So there's this home factor. But, unquestionably, in this primary there's a good deal of voting for somebody that looks like you or has the same last name or your ethnic or racial group"). Korbel thought the district would have a high probability of electing a Hispanic but did not anticipate the home-county rivalry. Tr830-31.

However, despite the split in the primary, Murray noted that Black and Hispanic voters coalesced around Veasey in the general election, including those heavily Hispanic precincts that voted for Garcia in the primary. He compared the top four performing heavily Hispanic precincts for Garcia in the primary in Dallas County to see if they supported Veasey in the general election, and found that they did—the average support for Garcia in the primary was 91.3% but these same precincts had an average support for Veasey in the general election of 81%. NAACP-64 (Murray Feb. 28, 2014 Supplemental Report on Plan C235) at 20.

In the 2014 Democratic primary, Veasey (now the incumbent) received over 90% of the Black vote, while Hispanics split their vote almost evenly between Veasey and Sanchez. Tr1369-71 (Alford); DX-883. Thus, although half of Hispanic voters now supported Veasey, half did not.

And in the 2016 Democratic primary, Veasey again received over 90% support from Black voters, but his Hispanic support fell (from 49.6% in 2014 to 32.9% in 2016), and 67% of Hispanic voters supported Carlos Quintanilla. Tr1370-71; DX-883. Alford noted that, even after a considerable period of time in which we have an incumbent who's had a chance to effectively represent everyone in the district, Hispanic voters still would prefer that there be an Hispanic representative in that district. Tr1370-71.

Dr. Lichtman performed an ecological regression analysis of the percentage of Anglos, African Americans, and Latinos among voters participating in the Democratic primaries for CD33. Tr956-58; Quesada-1 (Lichtman report) at 50 (Table 2). In the 2012 primary, 2.4% of Latino

VAP turned out, making them 36% of voters in the primary; 14.8% of African American VAP turned out, making them 64% of voters, and Anglos were 0% of voters. In the 2012 runoff, 3.4% of Latino VAP turned out, making them 47% of voters, and 13% of African American VAP turned out, making them 53% of voters. In the 2014 primary, 2.3% of Latino VAP turned out, making them 35% of voters, and 15% of African American VAP turned out, making them 65% of voters. In the 2016 primary, 4.4% of Latino VAP turned out, making them 39% of voters, and 20.5% of African American VAP turned out, making them 53% of voters (Anglos were 8% of voters). This demonstrates how low primary turnout is overall, and especially for Latinos, whose highest turnout percentage was 4.4% of voting age population. It also confirms that African-American voters dominate the primary based on their relative turnout. Tr957-58.

All experts agree that both Latino and African-American voters strongly supported Veasey in the general election. Lichtman found 99% African-American support and 95% Latino support in 2012 and 100% African-American support and 98% Latino support in 2016. Tr959 ("[G]iven those degrees of cohesion, this is pretty safely a district where African Americans and Hispanics in the general election can elect candidates of their choice. And as I said, this is when you really get the verdict of voters, not in those low turnout primaries."); Lichtman Report at 52 (Table 4).

Lichtman's analysis showed that 55.7% of African-American VAP turned out in the 2012 general election, making them 41% of the voters, 10.8% of the Latino VAP turned out, making them 27% of the voters, and 41.2% of the Anglo VAP turned out, making them 32% of the

voters. Lichtman Report at 53 (Table 5). In 2016, 45.6% of the African-American VAP turned out, making them 31% of the voters, 14% of the Latino VAP turned out, making them 33% of the voters, and 49.6% of the Anglo VAP turned out, making them 35% of the voters. *Id.* Lichtman noted that this demonstrates that turnout in general elections is vastly higher than turnout in primaries, and that combined African Americans and Latinos comprise a majority of the electorate. Tr959. Dr. Alford felt that "partisan voting reunited Black and Hispanics in voting for the Democratic candidate" in the general election; he found that the evidence "does not support the assertion that there is a cohesive, geographically compact coalition that can be treated as a single group." D-424 at 18-19.[61]

Based on an analysis of primary elections in CD33, Alford's opinion is that black and Hispanic voters in the district are not cohesive in their choice of minority candidates in the primary in the district. Tr1371. He notes that this is why some Plaintiffs' experts characterize the current CD33 as a black opportunity district and not a coalition district. Tr1371-72.[62] He further notes this is why the *Gingles* proposals do not truly propose minority coalition opportunity districts, but either African-American or Hispanic opportunity districts. Plaintiffs' *Gingles* proposals, in one form or another, shift decidedly

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[61] Dr. Alford also concluded that Anglo voters were not cohesive or at least "not polarized in a way that would enable the Anglo vote to block the nomination of a Black- or Hispanic-preferred candidate." D-424 at 18.

[62] Dr. Lichtman not only stated that CD33 is an African-American opportunity district, he stated that Hispanics are "shut out" in CD33 due to high African-American primary turnout. Tr955, Tr963.

in the direction of increasing the black CVAP proportion of CD33, not seeking to make the district work as a combined majority district, but seeking to make the district more securely a black opportunity district. Tr1374.[63] Similarly, the new coalition district placed between CD30 and CD33 is proposed to perform for Latinos, helping to cure the Latino representation gap in DFW. Although Alford agrees that black and Hispanic voters come together in the general election because of partisanship, he feels that whether they can get a representative of choice from their ethnic group is of critical value. Tr1382-83.

Dr. Alford admitted that in CD33, the general election turnout ranged from 28.2% in 2014 to 53.6% in 2016, while the Democratic primary turnout ranged from 1.3% in 2014 to 8.6% in 2016. Tr1454. He further admitted that the number of Hispanics who chose to vote for Veasey in the general election far surpassed the number that even turned out for the primary. Tr1460. For those Hispanic voters who did not vote in the primary, Quesada Plaintiffs contend that Veasey was their first and only choice, such that he was the first choice of 65.6% of Hispanic voters and the second choice of 17.9% of Hispanic voters, and not the choice of 16.4% of Hispanic voters. Docket no. 1527 at 47. Dr. Alford admits that he reaches his conclusion concerning the lack of cohesion solely on the primary elections and not general elections. Tr1448.

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[63] Alford feels that many of the proposed coalition districts will turn out to be African-American districts, thus giving more representation to a group that is not significantly under-represented, while not fixing the underlying problem of Hispanic under-representation. Tr1380-81.

In addition to primaries, Defendants cite to lay witness testimony indicating a lack of cohesion, including specifically: (1) the testimony of Tarrant County commissioner Roy Brooks, who stated that in the CD33 primary and other elections, Black and Hispanic voters have supported different candidates, Tr1237[64]; (2) Franklin Moss's testimony that in Democratic primary elections in Tarrant County, Black and Hispanic voters are less likely to vote for the same candidates, Tr1307[65]; (3) Alex Jimenez's testimony that in Tarrant County, Black voters would rather support Anglo candidates than Hispanic candidates, Tr359[66] ; (4) Rep. Anchia's testimony concerning tension between black and Hispanic school board members on the Dallas School Board, Tr136; (5) Elizabeth Alvarez Bingham's deposition testimony that

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[64] Brooks agreed that, in his experience in Tarrant County, sometimes African-American and Hispanic voters prefer different candidates in Democratic primary elections, such as in CD33 in 2012. Tr1237. The majority of African-American voters in Tarrant County supported Veasey and the majority of Hispanic voters in Tarrant County supported Garcia in the runoff. Tr1237. In general elections in Tarrant County, African-American voters and Hispanic voters coalesce to vote for the same candidate; they both tend to be Democrats. Tr1239 (Brooks).

[65] Moss had "been informed" that Latino and African-American voters do not always support the same candidates and agreed that would be more likely to occur in Democratic primaries. Tr1307. He also agreed that, in Tarrant County, all things being equal, African-American voters would prefer to have an African American represent them. Tr1307.

[66] "Q. In your experience in Tarrant County do you believe that African Americans would rather support Anglos than a Hispanic candidate? A. Yes."

minority groups do not vote cohesively in Dallas County (docket no. 1460-6 at 77-78[67]). Docket no. 1526 at 83-84.

Plaintiffs, on the other hand, offered testimony from lay witnesses to show cohesion. Franklin Moss is an African-American NAACP member who has been a Fort Worth resident for 72 years. He testified that he endorses Latino candidates, and he cited a recent Fort Worth City council election for District 2 as an example where African-American and Latino residents of Tarrant County worked together to elect a Latino candidate they both support. He testified that "a group of persons inside of the loop, 820," which is an area that is predominantly black and Hispanic, worked together to ensure that they elected a city council representative from District 2, and they have been successful in electing a Latino representative. Tr1297-98.

Rep. Toni Rose (HD110) from Dallas County testified that the Latino community came out in protest and support for a recent African-American police shooting victim. Tr1310. She also testified that the issues that face the African-American community and the Latino community are melded together; they both have issues with and are affected by access to health care, issues with poverty, issues with immigration, racial profiling. Tr1311. Rose stated that, in Dallas County, after the passage of

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[67] "Hispanics in Dallas County do not all vote the same even within political parties. African-Americans as well. Even within political parties, there is a generational gap in the democratic party between older Hispanics and African-Americans and younger Hispanics and African-Americans. And within the democratic party there is a large disconnect and substantial infighting, cross-party accusations and claims of racism between the Hispanics and African-Americans in a democratic party as against each other."

SB4 (the sanctuary cities bill), the Latino community and the African-American communities came together to support the Latinos' efforts to have the City of Dallas join in the lawsuit in opposition to the bill. Tr1315-16. Rose testified that there is a political coalition between African Americans and Latinos in Dallas County, and that quite a few Latino judicial candidates who ran in county-wide races would not succeed without the coalition and African-American support.[68] Similarly, she felt that African-American county-wide officials would have the same difficulty without Latino support. Tr1311-12.

Rep. Johnson, an African American, long-time resident of Dallas County, and representative of HD100, testified that "when there are races that are conducted in districts where you have African-Americans and Latinos living together, which is a lot of my district and, frankly, most of the southern portion of Dallas before you get to the southern Dallas suburbs," then "voters of color" would coalesce around the same candidates. Tr518-19. He also testified that he receives Latino support in his elections and that they have never talked of running a candidate against him, because he is responsive to their interests. Tr519-20. He testified that Dallas County Sheriff Lupe Valdez "gets a lot of support across communities" and that she would not continually win without support from Latinos and African Americans. Tr520. He further

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[68] Rose was aware that some had run in contested primaries, including Hector Garcia and Maricela Moore. She was not aware of Garcia's primary opponent, but she testified that Moore's opponent was Monica Purdy. Tr1321-22. She testified that Hispanics and African Americans voted for Moore, and assumed that because Moore won, she received a large amount of African American support, but she did not have specific knowledge of the voting patterns. Tr1322.

testified that his mother "loves" Rep. Anchia and "we have all kinds of crossover appeal like that in our districts because we've lived together for so long, those two communities." Tr520-21.

Rep. Anchia testified that MALC's proposed CD6 located in Irving and Grand Prairie roughly mirrored the county commissioner district in Dallas County represented by Elba Garcia, that Korbel's analysis indicated it would perform for the Democrat in general elections, and that it was likely that a Latino would win. Tr713-17. However, Rep. Anchia specifically stated at trial that he was not providing testimony on African-American and Latino cohesion. Tr719-20. Nevertheless, in his deposition, he testified that he had seen examples of Latinos and African Americans being cohesive in Dallas, and that he believes they are cohesive more often than not. Anchia depo. at 117, 163. And former Plaintiff Juanita Wallace, a long-time Dallas resident, offered testimony that Black and Latino voters work together to elect candidates, noting specifically Elba Garcia, who got significant support from Black voters, though she had not specifically reviewed election data for the race. TrJ568-59, TrJ582.

Raul Magdaleno testified that there is a coalition in Dallas between Latinos and African Americans, and that they tend to vote together based on issues important to them that they have in common, such as education, health care, and economic disparities. TrJ1134.

Both lay witness testimony concerning cooperation between the minority groups and statistical evidence can be used to prove cohesion. *See Brewer v. Ham*, 876 F.2d 448, 453-54 (5th Cir. 1989). Statistical evidence is not a legal requirement or the "sine qua non to establishing

cohesion," but Plaintiffs "must still satisfy their burden of proof." *Id.* at 454. Lay witnesses testified generally about black and Hispanic coalitions and shared political identity stemming from shared community concerns. Certainly it is undisputed that black and Hispanic voters choose primarily to vote in the Democratic primary, and that they vote cohesively for the Democratic candidate who emerges from the general election, regardless of the candidate's race, and regardless of whether they supported them in the primary.

Lay witness testimony concerning primary cohesion was mixed. And the statistical analyses of Democratic primaries in Dallas and Tarrant Counties consistently demonstrates that black and Latino voters are not cohesive. It seems undisputed that, all things being equal, each group would prefer a candidate that looks like them. *E.g.* Tr1307 (Moss) ("And in Tarrant County, all things being equal, you would agree with me that African American voters would prefer to have an African American represent them, right? A. Yes."). That is why Dr. Murray and the African-American Congresspersons have testified that, when there are roughly equal numbers of black and Latino population in a district, they will develop "tension" as each group vies to elect candidates of their own in the primaries. While it was explained that this was more likely when the groups were not consulted in drawing the districts or when representation for one or both groups was proportionately low, it indicates that these groups cannot functionally be treated as one in terms of voting behavior. And whether minority groups have the opportunity to elect candidates of their choice is the operative inquiry for *Gingles*. Primaries inform the analysis of whether each minority group in the coalition

has the opportunity to elect candidates of their choice, or whether, as Dr. Alford put it, one group is acting as "filler." Most Plaintiffs' experts agree that, in CD33, Latino voters are not able to elect their candidate of choice.[69]

Also troubling is the fact that African-American voters do not act cohesively in support of Latino candidates against Anglo candidates. While the probative value of the

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[69] It is especially interesting that Latinos are not having success in CD33, given the expectation when it was drawn that it would perform for Latinos in light of its proportionately higher HCVAP. Contrasting the situation to that in CD24 in Dallas County considered in *LULAC v. Perry*, it cannot be said that Hispanic voters are simply allowing African-American voters to vote for their candidate of choice in the primary, because unlike CD24, where there was no contested primary, Hispanics have sponsored a candidate in the CD33 primaries. Although it need not decide the issue, the Court does not necessarily agree that Latinos lack opportunity in CD33. In *LULAC*, the Supreme Court noted that "[t]he opportunity 'to elect representatives of their choice,' 42 U.S.C. § 1973(b), requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice." 548 U.S. at 445. The African-American voters in CD24 could only ever influence the outcome of the primary given their low HCVAP% and lack of cohesion with Latinos (as found by the district court). In this case, black and Latino voters together can control the outcome of primaries in CD33, based on their numbers, if they vote together, and could thus demonstrate the opportunity required by *Gingles*. But they have not voted together in the primaries, and black voters have controlled the primaries based on relative turnout. But there are 142,637 citizen voting age Hispanics (327,150 multiplied by .436) and only 78,516 citizen voting age African Americans (327,150 multiplied by .24) in CD33, meaning that Hispanic voters should easily be able to defeat African-American voters if they increase their relative turnout. Regardless, unless they vote cohesively in the primaries, it is not a minority coalition opportunity district.

HD90 primaries is diminished by the fact that only approximately 5,000 voters or fewer are involved and the Anglo candidate was a long-time incumbent favored by the black community, Dr. Engstrom's primary analyses of statewide elections in Tarrant and Dallas Counties demonstrate that African Americans are even less likely to support Latino candidates than are Anglo voters. The consistent lack of cohesion severely undermines Plaintiffs' claims, as does their assertion that their new proposed coalition districts would perform for one group or the other, and not both cohesively.

Considering all of the lay witness and statistical evidence as a whole, the Court finds that Plaintiffs have failed to establish the necessary minority cohesion to satisfy *Gingles* 2. Accordingly, the *Gingles* results claims must fail.

B. Intentional Discrimination/Vote Dilution Claims

As noted, several Plaintiffs contend that the configuration of DFW and the addition of CD33 in DFW did not remedy the cracking and packing and intentional discrimination found by this Court concerning Plan C185. As discussed above, Plaintiffs complained generally that in Plan C185, minority communities in DFW were cracked (primarily within urban areas where fingers reached in from Anglo-dominated suburban districts). They also complained that CD30 was packed with minorities. This Court addressed those claims in Plan C235 by removing the fingers from minority areas, and what was left was CD33. The Court noted that CD33 was "appropriate to remedy the alleged race-based discrimination that occurred" but "goes no further than required under *Perry v. Perez*." Docket no. 691 at 38. When this Court later

analyzed the entire record, it found that Downton had intentionally drawn and cracked a proposed minority district. CD33 looks significantly like the proposed minority coalition district that this Court found was drawn and then intentionally cracked. Thus, CD33 in Plan C235 is an appropriate remedy for that cracking, without going further.

The Court also addressed Plaintiffs' claims that CD30 was packed in Plan C235 by reducing the combined minority population to near benchmark levels.[70] When this Court later analyzed the entire record, it found that Downton had moved Anglo voters out of CD30 and minority voters into CD30, increasing the minority population above benchmark levels. Because Plan C235 returned these population levels to slightly below benchmark levels, it appropriately remedied that packing.

Plaintiffs complain that Plan C235 does not remedy all of the cracking because minority communities in other portions of DFW remain divided, and they contend that it does not remedy all of the packing in CD30 because CD30 needs far fewer minority votes to continue functioning as an African-American ability district, and those excess minority votes are thus being wasted. They contend that, together, the remaining cracking and packing prevents the creation of additional minority opportunity districts. The Court has already found, however, that Plaintiffs

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[70] This Court noted that the combined H+BVAP was increased from 76.7% in the benchmark to 81.5% in Plan C185, but reduced to 75.9% in Plan C235. Docket no. 691 at 37 n.83. The D.C. Court also noted that CD30 was packed insofar as the combined minority voting age population was increased from the benchmark district by 4.8%. *Texas v. United States*, 887 F. Supp. 2d at 222 (fact finding 120). This packing was remedied by Plan C235.

failed to demonstrate that additional minority opportunity districts with cohesive minority communities could be drawn. In addition, the fact that CD30 has a higher-than-necessary minority population is not itself unlawful packing. That higher-than-necessary minority population was in CD30 in the benchmark, thus Downton did not put those voters into CD30 with a discriminatory purpose when he drew Plan C185. And while Plaintiffs contend that those voters could be placed into other districts to create additional opportunity districts, the failure of their *Gingles* claims shows that removing these voters would not create additional single-minority or minority coalition districts. Thus, the Court finds that Plan C235 adequately remedies the cracking and packing found by this Court.

Last, the Quesada Plaintiffs further indicate that this Court should fix the cracking of southeast Arlington/Grand Prairie found by the D.C. Court because it remains in Plan C235. Quesada Plaintiffs note that, in the section of its fact findings and conclusions of law entitled "Discriminatory Purpose in the Congressional Plan," the D.C. Court included the following finding:

> 112. CD 33 is one of the State's newly apportioned congressional districts. In the Congressional Plan, this district includes all of Parker County and parts of Wise County, both of which are predominantly comprised of Anglo, suburban areas. Anglos make up 85.3% of the population in Parker County and the portion of Wise County included in CD 33 is 78.7% Anglo. Pl.'s Ex. 12. In addition to those Anglo areas, CD 33 cuts into Tarrant County to include Tarrant County's fast-growing minority

> populations. Representative Veasey testified that enacted CD 33 "goes around southwest—underneath southeast Ft. Worth in the unincorporated Tarrant County, and then moves into Arlington, into the heavily Anglo part of Arlington, and then picks up the fast minority growth area in southeast Tarrant County, Arlington—southeast Arlington–Grand Prairie area." Trial Tr. 23, Jan. 18, 2012 PM (Rep. Veasey).

887 F. Supp. 2d at 220. The D.C. Court did not find that this particular cracking was unlawful, however. In an area with many minority communities, it is inevitable that some minority communities will remain cracked, and they cannot all be placed into a minority opportunity district. Because cracking this community has not been shown to intentionally or in effect prevent the creation of an additional opportunity district or to minimize minority influence, uncracking is not required.

As a result, the Court finds that Plaintiffs' intentional discrimination/vote dilution claims as to Dallas County fail as to Plan C235. No additional remedies are required in the DFW area.

IV. Houston area

Plaintiffs asserted § 2 results and statutory and constitutional discrimination claims in the Houston area with regard to Plan C185. With regard to the § 2 results claims, the Court found that Plaintiffs had failed to establish the first *Gingles* precondition for their proposed districts , but this did not preclude Plaintiffs from pursuing these claims with regard to Plan C235 with population data reflecting the minority population in 2013, when Plan C235 was adopted. Docket no. 1390 at 146-158.

The Court did not find sufficient evidence of racial gerrymandering or racially discriminatory motive. *Id.* at 158-163. Though there was some circumstantial evidence consistent with racial discrimination, the Court ultimately found that Plaintiffs failed to sufficiently distinguish the role of race and politics in the drawing of district lines in Houston. *Id.* at 162.

The NAACP Plaintiffs and MALC bring § 2 results claims in the Houston area with regard to Plan C235. Docket no. 897 (MALC) ¶¶ 60-61. MALC proposes new coalition districts in Plan C285, and NAACP joins in MALC's plan.

Dr. Murray testified in 2011 that there is Latino growth outside of CD9 and CD18 in Houston, which would have an impact on the ability to draw a new Latino opportunity district because "there's a lot of raw material to work with." Tr1283. He testified that there was growth in the southeastern part of the county, some in the present CD29, but there was also a lot of growth in CD22 and CD36. He also testified that districts 2 and 7 contain substantial areas of heavily Latino voter concentrations. Tr1283-84. He felt that a functional Latino opportunity district could be added, though he had not seen a plan creating a new HCVAP-majority district. Tr1273-74.

In Plan C235, CD29 is an HCVAP-majority (61.6%) district that consistently elects an Anglo Democrat, and CD9 and CD18 are near majority-BCVAP (48.5% and 47%, respectively) districts that consistently elect African-American Democrats. MALC offers the only demonstration plan for the Houston area in this phase, Plan C285, which proposes two additional minority opportunity districts—it maintains the existing African-American districts as ability districts, creates a new

HCVAP-majority district, reworking CD29 into a coalition district, and creates an additional coalition district. JX-104. Expert George Korbel drew Plan C285, and he testified that he tried to simplify the existing minority districts while creating two additional minority opportunity districts. Tr736.

He created new HCVAP-majority (50.7%) district CD36 that he characterized as a "ship channel district" that includes Galena Park and Pasadena, South Houston, Baytown, and Channelview. Tr736-37. CD34 is a new B+HCVAP coalition district (53.3%) dominated by Acres Homes, Studemont, and Oak Forest and the areas in the Spring Branch Independent School District that are north of I-10. Tr736-37. CD18 is the "traditional black district" that was "simplified" and includes Third Ward, Fifth Ward, Montrose, Kashmere Gardens, and black neighborhoods all throughout the center part of Houston. Tr737. Both its BCVAP and HCVAP are reduced from Plan C235 and it becomes 40.2% BCVAP and 18.2% HCVAP. JX-104.3. CD29 includes Aldine and parts of Spring Branch and Sharpstown and Gulfton. Tr737. It is no longer majority-HCVAP but is a 37.6% HCVAP + 16.5% BCVAP coalition district. JX-104.3; Tr738, Tr742. CD9 was then modified "slightly" to fit in with the other districts as a south Harris County district with virtually all the neighborhoods that were in CD9. Tr737-38. Both its BCVAP and HCVAP are reduced from Plan C235 to 41.4% BCVAP and 18.4% HCVAP.

Korbel testified that he tried to put these districts entirely within the urban areas, and in doing that, created five minority districts; all of the districts consistently functioned over the test period for Democrats in the

exogenous elections. Tr738; Tr742 (new CD34 and CD36 perform consistently for minority voters); MALC-25.

As with DFW, the minority population (this time also significantly more Asians) grew in the Houston area, and Anglo population declined. But as in DFW, no party has proposed additional single-minority-majority-CVAP districts in the Houston area. Although Plan C285 does create a new HCVAP-majority district, CD29 loses its HCVAP-majority status. Thus, as in DFW, Plaintiffs must rely on proposed coalition districts to meet the first *Gingles* precondition. Defendants contend that Plaintiffs have failed to prove cohesion in the Democratic primaries, and thus cannot meet their burden under the second *Gingles* precondition.

In 2011, several witnesses testified generally about a "Black and Brown coalition" in Houston. *E.g.*, docket no. 1340 at 373 n.52. Congressman Green testified that African-American and Latino communities within his district had worked together to elect Sheriff Adrian Garcia, the first Latino sheriff. Docket no. 1340 ¶ 564. Rep. Senfronia Thompson, an African American, testified that African Americans, Latinos, and Asians work in cooperation together politically. Docket no. 1364 ¶ 503. She testified that she receives Latino support and that she has supported many Latinos. *Id.*

It is generally undisputed that, here, as elsewhere, African Americans and Latinos choose primarily to participate in the Democratic primaries. In Harris County, Dr. Lichtman found that 86.76% of Hispanic and 97.87% of Black voters participated in the 2008 Democratic primaries, and 53.46% of Hispanic and 94.12% of Black voters participated in the 2010 Democratic

primary. Joint Expert Ex. E-3 at 5; *see also* docket no. 1364 ¶ 502 (noting that Murray found "almost zero black population voting in the Republican primaries and very, very little Hispanic population"). It also undisputed that African-American and Latino voters coalesce around the Democratic candidate in the general election, as shown through both lay witness and statistical evidence.

But Dr. Murray and the African-American Congressperson Intervenors were concerned about the C185 configuration in Houston's African-American districts creating "tension," where African Americans and Latinos would compete for control over districts as Latino population increased in the African-American districts. Docket no. 1340 ¶ 566. Dr. Murray testified that such tension is more likely when representatives are not consulted in the drawing of the districts. Tr1284-85. Congressman Green testified that, when one group has a plurality, the two groups can work well together through a "gentle person's agreement" to back candidates from the plurality, but when there is no plurality, tension may develop because both groups want representation. Docket no. 1340 ¶ 567.

Murray agreed that, if Hispanic and African-American populations were balanced about evenly in a district, "you are going to get some tension in Democratic primaries." *Id.* ¶ 566 n.52. He agreed that, in the primary, African Americans tend to vote for African Americans and Hispanics for Hispanics. *Id.*

Dr. Alford notes that in proposed CD34 in Plan C285, the combined BCVAP is at 25% and HCVAP is at 28.6%,

and MALC has not offered primary analysis for this proposed district. He testified,

> If we had no other information, we might assume that it reflected a kind of perfect combined minority district because the population numbers suggest that it's pretty evenly divided between the two groups. If they're politically cohesive, that might be just the right way to draw that district.
>
> We know from the Harris County primary analysis, Dr. Engstrom, that the two groups are not politically cohesive, and we know from the experience in CD33 how that typically would play out. So this is a district that's . . . if it was implemented, likely to be characterized a few years from now as black opportunity district.

Tr1378.

As noted by Dr. Alford, Dr. Engstrom's statistical analysis indicates a lack of Democratic primary cohesion between African-American and Latino voters, with African Americans sharing support for the Latino candidate with Latinos for only two of six candidates in Harris County between 2006 and 2010. Docket no. 307-1 at 16. In several primaries, African-American support for the Latino candidate was lower than "others." Docket no. 307-1 at 17-18. Dr. Engstrom's results are set forth in the following table:

Harris County

	African American voters	Latino voters	Other voters
2006 Dem. Primary Lt. Gov. (Alvarado)	28.0 24.9 - 31.0	39.5 36.1 - 42.7	38.3 36.5 - 40.2

2006 Dem. Primary Lt. Gov. Runoff (Alvarado)	34.8 31.8 - 37.6	43.5 39.0 - 47.9	43.4 40.6 - 46.3
2008 Dem. Primary US Senate (Noriega)	44.1 42.6 - 45.6	73.8 71.2 - 76.4	54.0 52.8 - 55.2
2008 Dem. Primary Sup. Ct. Pl. 7 (Cruz)	27.6 26.3 - 28.8	75.8 73.6 - 78.0	30.6 29.5 - 31.7
2008 Dem. Primary Sup. Ct. Pl. 8 (Yanez)	52.7 51.7 - 53.9	87.8 85.9 - 89.7	44.3 43.1 - 45.4
2010 Dem. Primary Lt. Gov. (Chavez-Thompson)	37.8 36.4 - 39.2	67.6 64.5 - 70.7	31.1 29.6 - 32.6
2010 Dem. Primary Land Comm'r (Uribe)	69.6 68.2 - 70.9	59.0 55.5 - 62.6	46.3 44.7 - 47.9
2014 Dem. Primary Governor (Madrigal)	1.7 0.2 - 2.9	31.8 29.0 - 34.8	.1 0.0 - 0.3

Dr. Chervenak only looked at one primary election in Harris County, the 2016 HD149 Democratic primary, where he measured support from various groups for the Asian candidate Hubert Vo. He found that all the various groups shared similar levels of support for Vo: African Americans at 56.4%, Latinos at 60.6%, Asians at 62%, and White voters at 55.4%. NAACP-2 at 20. Thus, this does not tell us much about a particular African American and Latino coalition.

While there may not be as much evidence indicating a lack of primary cohesion in Houston as there is in DFW, neither is there much evidence proving primary cohesion.

Considering all the evidence, Plaintiffs have failed to satisfy the burden of proving minority group cohesion in Houston. The § 2 results claim in the Houston area fails.

V. CD23

Several Plaintiffs challenged the configuration of CD23 in Plan C185, arguing that it was racially gerrymandered by applying the "nudge factor," in which Hispanic population and turnout were manipulated to make CD23 appear to be a Latino opportunity district when in fact it was not. The Task Force also asserted a *Shaw*-type racial gerrymandering claim against CD23.

In the § 5 preclearance litigation, plaintiffs asserted retrogression and discriminatory purpose claims. Plan C235 incorporated changes to CD23 that attempted to address the "not insubstantial" claims that CD23 was impermissibly retrogressed from the benchmark in Plan C185. Docket no. 691 at 31. At the time the Court considered adopting Plan C235, the parties disputed whether CD23 was effectively adjusted to avoid retrogression, with MALC and certain other Plaintiffs arguing that its performance was below benchmark levels because in almost all elections, the choice of Hispanic voters did slightly more poorly.[71]

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[71] The Task Force Plaintiffs stated that CD23 as altered in Plan C226 "restore[d] CD 23 as a Latino opportunity district" and noted that the win-loss record of Latino-preferred candidates was similar to the benchmark. Docket no. 638 at 35. The Task Force stated that "[t]he restoration of CD23 in C226 addresses the Latino Task Force claim of intentional discrimination under the Constitution and §§ 2 and 5 of the Voting Rights Act." *Id.* The Task Force did not assert claims against CD23 in Plan C235, and the Court denied the Task Force's motion for leave to amend to pursue such claims shortly before this trial in 2017.

Dr. Ansolabahere compared the proposed CD23 in Plan C226 to CD23 in the benchmark in February 2012 as this Court was evaluating the proposed compromise plan. Rod-916 (Analysis of CD23 under Plans C100 and C226). He noted that the HCVAP increased from 59.3 to 60.6%, but that performance for Hispanic-preferred candidates decreased by about one-to-two percentage points in every election he studied, with an average reduction of 1.5%, although the number of wins did not change. Although CD23 was better than in Plan C185, he viewed it as reducing ability to elect from Plan C100.

However, because CD23 in Plan C235 maintained comparable win-loss records on various election indices,[72] the Court concluded that it had been sufficiently restored to benchmark performance levels to avoid retrogression, even if the margin of victory slightly decreased. Docket no. 691 at 31-32. Further, because Plaintiffs argued that CD23 in the benchmark was an opportunity district and its performance on the various indices was similar in Plan C235, the Court found that Plaintiffs' § 2 claims were resolved, and the Court also did not need to decide the discriminatory purpose claims related to CD23. *Id.* at 32.

In its Order on Plan C185, this Court found that the Task Force Plaintiffs succeeded on their *Shaw*-type racial gerrymandering claim as to CD23, that CD23 was no longer an opportunity district despite its HCVAP-majority status, and that mapdrawers intentionally discriminated against Latino voters and diluted their vote in violation of § 2 of the VRA and the Fourteenth

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[72] This included the OAG 10, Dr. Handley's index, and Dr. Engstrom's index.

Amendment through the use of the nudge factor. Docket no. 1390 at 11-32.

MALC, the Rodriguez Joint Plaintiffs, and Congressman Cuellar assert claims against CD23 in Plan C235 on the basis that it did not fully remedy the intentional vote dilution and intentional discrimination behind the district lines in Plan C185. The Rodriguez Joint Plaintiffs contend that CD23 continues to run afoul of § 2 despite the adjustments made in Plan C235. Docket no. 1524 at 15. The Court must thus determine whether CD23 as reconfigured in Plan C235 is a Latino opportunity district and whether the harms inflicted in 2011 are remedied.

First, however, the Court considers Defendants' assertion that these Plaintiffs lack standing to challenge CD23.[73] *See* Docket no. 1526 at 74 n.14. MALC has identified "multiple members of its organization who reside in CD 23 or who have districts within the geographic constraints of CD 23." Docket no. 1532 at 1. MALC notes that it previously identified Rep. King as a resident and voter in CD23 in docket no. 258 and also identified additional MALC members who were residents of CD23. *Id.* at 2. Further, MALC member Poncho Nevarez represents and resides in HD74, which is entirely contained within CD23. MALC-1.

MALC has proven its standing to assert claims against CD23.[74] "[A]n association has standing to bring

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[73] Between closing argument and their closing briefs, CD23 is the only area in which Defendants raise a specific challenge to the standing of any Plaintiff.

[74] To the extent that other Plaintiffs also assert these claims, the standing of MALC is a sufficient basis for this Court's analysis. *Nat'l*

suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Com'n*, 432 U.S. 333, 343 (1977). First, as noted, at least one MALC member would have standing to sue in his or her own right as a resident of CD23.

Second, the interests sought to be protected—Latino voter strength and representation in Texas's congressional districts—are germane to MALC's purpose. Tr145 (testimony of Rep. Martinez Fischer that MALC looks to develop membership that will take into account the views of the minority community when it comes to public policy and voting rights). Because MALC is an association of Texas House members, Defendants argue that "the configuration of congressional districts is not germane to the organization's purpose." Docket no. 1526 at 74 n.14. Although the configuration of congressional districts is not *itself* MALC's purpose, that is not what the law requires. The interest to be protected need only be *germane* (*i.e.*, relevant) to MALC's purpose, which is a "low threshold"—"the germaneness requirement is 'undemanding' and requires 'mere pertinence' between the litigation at issue and the

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Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth., 389 F.3d 491, 501 n.18 (5th Cir. 2004) ("[W]hen one of multiple co-parties raising the same claims and issues properly has standing, we do not need to verify the independent standing of the other co-plaintiffs."); *see also* docket no. 1365 at 116 n.72 ("[T]he Court rests its analysis of the merits on the standing of LULAC, which covers all of the *Larios* claims in the lawsuit.").

organization's purpose." *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550 n.2 (5th Cir. 2010) (quoting *Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 148 (2d Cir. 2006)). Here, the configuration of congressional districts overlaps in important ways with MALC's purposes of growing membership and representing Latinos in Texas. MALC's ability to accomplish both of its goals is strengthened by increased Latino political power in congressional districts, even though the strengthening of Latino political power in congressional districts is not itself MALC's purpose. At the very least, MALC's challenges are "pertinent" to the purposes identified by Representative Anchia.

Third and finally, participation of individual MALC members is not necessary and Defendants do not argue otherwise. Accordingly, MALC has standing to assert its claims in CD23, and as a result, the Court finds it unnecessary to conduct a detailed standing analysis for other Plaintiffs.[75]

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[75] The Fifth Circuit has recognized various Supreme Court decisions that give courts "license to *avoid* complex of questions of standing in cases where the standing of others makes a case justiciable." *Nat'l Rifle Ass'n of Am. v. McGraw*, 719 F.3d 338, 344 n.3 (5th Cir. 2013) (emphasis original) (citing *Massachusetts v. EPA*, 549 U.S. 497, 518, 127 S. Ct. 1438, 167 L.Ed.2d 248 (2007) and *Bowsher v. Synar*, 478 U.S. 714, 721, 106 S. Ct. 3181, 92 L.Ed.2d 583 (1986). The Fifth Circuit has cautioned, however, that "it does not follow that these cases permit a court that *knows* that a party is without standing to nonetheless allow that party to participate in the case." *Id* (emphasis original). The procedural posture of this case and Defendants' standing challenge permits the Court to rest its analysis of multiple plaintiffs' claims on the standing of a single plaintiff. This case has been pending for six years, but after Defendants challenged

The parties are in agreement that the Hispanic voters in CD23 have a right under § 2 that the State must accommodate, but they disagree on whether CD23 as configured in Plan C235 is a Latino opportunity district. In Dr. Alford's March 2014 Supplemental Report (D-424), he opined that CD23 "is a politically competitive district that nonetheless provides an opportunity for Latinos to elect their candidate of choice." D-424 at 26; *id.* Table 6 (in

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standing at the motion to dismiss stage, they have not formally re-asserted their challenges by seeking summary judgment or specifically seeking dismissal as to any particular plaintiff on specific grounds. Thus, so long as a single party has standing to assert a particular challenge, the Court will assess the record as to that claim, regardless of whether other plaintiffs have standing to assert the same claim.

However, the Court notes that, even if MALC lacked standing here, LULAC also has a strong case for associational standing. This Court has admitted a declaration from LULAC's Texas State Director, Elia Mendoza, who states that LULAC has councils in Maverick and Val Verde Counties (which are in CD23), that each council has an officer and a contact person, and that there are multiple LULAC members who are registered voters in CD23 (though none are identified by name). Docket no. 1365 at 118 (2011 House Plan Opinion); docket no. 1342-1 (Mendoza declaration). In addition, Congressman Cuellar is the elected representative of CD28, which borders CD23 to the southeast, but is not a voter in CD23. However, elected officials may have standing to protect their interests as district representatives, including "the 'ability to protect their continued tenure,'" and restructuring of CD23 could affect Cuellar's district. *LULAC Council No. 4434 v. Clements*, 884 F.2d 185, 188 (5th Cir. 1989) (quoting *Williams v. State Bd. of Elections*, 696 F. Supp. 1563, 1572 (N.D. Ill. 1988)); *LULAC Council No. 4434 v. Clements*, 999 F.2d 831, 844 (5th Cir. 1993). In any event, the Court again reiterates that it need not decide this question of Congressman Cuellar's standing individually because he asserts the same claims as MALC, which has standing for the reasons described above.

C100 CD23 was 2 Democrat wins, 4 Republican wins; in C185 it was 0 Democrat wins, 6 Republican wins; in C235 it was back to 2 Democrat wins, 4 Republican wins). He asserts that, throughout its modern history, CD23 has been a highly competitive congressional district, producing victories for Hispanic Republicans during Republican tides, and producing victories for Hispanic Democrats during Democratic tides. He further notes that, if opportunity requires a demonstrated opportunity for Hispanic voters to elect a candidate of choice, then that has been empirically demonstrated for CD23 because in 2012, Pete Gallego defeated incumbent Francsico Canseco with 50.3% of the vote.

Dr. Alford's more recent analysis reflects an endogenous success rate of 33% (1/3 elections) and a success rate of 12% (3/25) on reconstituted statewide elections. D-878 at 16-17, 20; Tr1431 (Alford). Dr. Alford agreed that the district will more often than not elect the Anglo-preferred candidate in endogenous elections, favors the Anglo-preferred candidate in 88% of exogenous elections, and is designed to tilt in favor of Anglo-preferred candidates. Tr1389, 1402, 1430-31. But he still believes that CD23 provides the opportunity required by § 2. Plaintiffs contend that CD23 does not perform for Hispanic voters by electing their candidate of choice in a legally significant number of elections.

A majority-minority district must provide "real electoral opportunity" to the minority group in order for the § 2 right to be fulfilled. *See LULAC*, 548 U.S. at 428. "A 'real opportunity' is not a guarantee of success, as the Court is mindful that § 2 does not guarantee electoral success for minority-preferred candidates." *Perez*, 2017 WL 1787454, at *8 (citing *LULAC*, 548 U.S. at 428). CD23

satisfies § 2 if it offers Hispanic voters the real opportunity to elect their candidate of choice. We are in a unique position to evaluate that question with actual election data because of the peculiar posture of this case. Three endogenous elections have taken place in the district under the Plan C235.

When the current configuration of CD23 was adopted, the HCVAP was 61.3%, an increase from 58.5% HCVAP in the 2011 plan. The most recently available ACS five-year survey data (2011-2015) places the HCVAP at 62.1%. The SSVR in CD23 was stable across all three elections for which C235 has been in place: 55.6 , 55:9, and 55.3%, respectively.

From the 2012 to the 2016 election, Hispanic turnout increased from 46% to 48.2% of the turned-out vote, with a dip in the 2014 midterm election to 40.9%. This increase in Hispanic turnout led to a decrease in the vote gap between Hispanic and non-Hispanic voters from 16,075 in 2012 to 8,506 in 2016. Looked at another way, it reflects a 20.7% increase in the number of Hispanic voters and a 10.7% increase in the number of non-Hispanic voters.

Dr. Ansolabehere analyzed the Democratic vote totals in the areas moved in, moved out, and kept in the CD23 when compared to C185. He concluded that the areas that were brought into the district, while Democratic, contained insufficient votes to overcome the vote totals for Republicans in the areas that were kept in the district. This left Democrats with a vote deficit of approximately 8,000 votes. Rod-955 (Ansolabehere report) at 15. Such analysis has limited value for reviewing CD23's performance because we can look to the actual election results in three endogenous elections, which in this case

demonstrate the opportunity Hispanic voters have to elect their candidate of choice in CD23.

The Hispanic candidate of choice—Democrat Pete Gallego in all three elections—was elected in 2012, but was narrowly defeated by African-American Republican Will Hurd in 2014 and 2016. Gallego won in 2012 by a margin of over 9,000 votes. Gallego's margin of defeat in 2014 was about 2,000 votes and his margin of defeat in 2016 was about 3,000 votes. Both Dr. Engstrom's bivariate and Dr. Alford's multivariate ecological inference analyses of CD23 demonstrate that Gallego lost Hispanic vote share from 2012 to 2016. Engstrom's bivariate analysis shows his Hispanic support declining from 86.9 to 82%. Alford's multivariate analysis shows Gallego's Hispanic support declining from 82.6 to 76.2%. Dr. Alford testified that a 4% drop in support among Hispanics, smaller than either Engstrom or Alford's analyses demonstrate, would result in a more than 3,000 vote decrease for Gallego. Had Gallego retained his support among Hispanic voters, particularly in an election in which Hispanics were also gaining vote share over 2012, Gallego would have defeated Rep. Hurd.[76] The

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[76] Dr. Alford disagreed with Dr. Flores's conclusion that Gallego lost because of increased racial polarization in the district. Tr1400. Dr. Alford noted that Gallego's Anglo support increased from 23.9 in 2012 to 26.85% in 2014, which is not unexpected since he was the incumbent, but Hispanic turnout dropped more dramatically than Anglo turnout in the non-presidential election year. Tr1393-96. Thus, although both Latino and non-Latino support for Gallego increased, the relative proportions in the electorate that are Hispanic and Anglo are different in that midterm, and "it's an electorate that's less helpful to an Hispanic candidate," such that Gallego loses. Tr1397. Alford further noted that, in 2016, Gallego is not the incumbent, and Hurd is. Hurd is getting 74.8% of the Anglo vote; Gallego is down at 22.4%.

competitiveness of these elections is sufficient to find that CD23, as currently configured, is a Hispanic opportunity district.

The exogenous elections over the previous three cycles show less success for the Hispanic candidate of choice in the district. Under the current plan, the Hispanic candidate of choice was successful in three of twenty-five exogenous elections in CD23.[77] The Rodriguez Plaintiffs contend that "an abysmal 12% success rate is far below any of the indices this Court cited in its discussion of

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Gallego is at 76.2% Hispanic support and Hurd at 19.1%. Tr1394. In terms of Hispanic support, Gallego is down from 2014, which Alford did not think was unusual because Gallego was running as a challenger rather than as an incumbent and Hurd, the incumbent, has had some time to move from being a candidate to being someone who actually represents the district. Tr1394. Although the proportion Hispanic in the turned-out vote went up by a couple of percentage points, Gallego still lost, and that is where Alford felt the EI analysis explained why—Gallego's support among *both* Hispanics and Anglos dropped. Tr1398-1400. Alford felt this was not increased racially polarized voting because Gallego was defeated in 2014 in an election when his level of support increased in both Anglos and Hispanics, and he was defeated again in 2016 when his level of support decreased in both Anglos and Hispanics. Tr1400-01. Thus, Alford indicated, the 2014 defeat was due to a decrease in relative turnout, and the defeat in 2016 was due to a decrease in Hispanic cohesion in support of Gallego (as well as a decrease in Anglo support). *See also* Tr1065 (Ansolabahere) (noting that if there is a small difference in turnout in the favor of the Hispanic-preferred candidate, then the district polarization will kind of help cement that as a Hispanic district, but if there is a small deficit in the opposite direction, that will help cement it as a non-Hispanic district).

[77] Korbel's analysis showed that CD23 performed in exogenous elections 0/10 in 2010, 0/5 in 2012, 0/12 in 2014, and 2/8 in 2016. Tr726; Tr743; MALC-25.

benchmark CD23" and, unlike CD23 in Plan C100, the endogenous success rate is also low (33% compared to 66% in Plan C100). Docket no. 1254 at 16. But exogenous elections are far less probative than the actual endogenous election data we have. We have also rejected a pre-set success rate for the minority preferred candidate in exogenous elections. *Perez,* 2017 WL 1787454, at *8. Such a requirement is not compatible with the Supreme Court's directives that § 2 requires a searching, practical inquiry specific to the facts of each case. *Id.* We know that CD23 may still perform for minority-preferred candidates even when its performance on statewide indices is equal to or less than 50%. Although a 33% endogenous success rate is undoubtedly less than the 66% we considered to provide opportunity in CD23 in Plan C100, as Dr. Alford noted, with only three endogenous elections, one change in win/loss results in a large change in percentage. And the fact that endogenous wins are less than 50% is not dispositive.[78] The evidence indicates that Latinos *can* win elections in the district, and whether they can win in the future is largely within their control.

On the whole, CD23 is a highly competitive district for U.S. Representative candidates. Hispanics have an opportunity to elect a candidate of their choice where merely small changes in cohesion, turnout, candidate quality, or a host of other factors could tip the election in their favor. Section 2 is not meant to be a guarantor of political success and we will not further tinker with the boundaries of CD23 to achieve that end.

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[78] "The circumstance that a group does not win elections does not resolve the issue of vote dilution." *LULAC,* 548 U.S. at 428.

Last, the Court considers whether the intentional harms found with regard to Plan C185 continue in Plan C235, despite the changes to the district.[79] In finding that mapdrawers applied the "nudge factor" in CD23 in Plan C185, the Court noted that the Legislature intentionally split Maverick County and the City of Eagle Pass to exclude politically active Hispanics who would not support Canseco, increased the turnout gap between Latinos and Anglos, and increased SSVR while simultaneously decreasing Latino cohesion (and performance) by selectively including high SSVR districts with worse performance for Latino-preferred candidates.[80] The Court found that the increases in SSVR and HCVAP were not intended to and did not maintain or improve Latino voting strength. Docket no. 1390 at 22.

In Plan C235, no changes were made to El Paso or the northern border, but Maverick County was made whole and placed within CD23, and Atascosa County was made whole and placed within CD28. Changes were also made to CD20, CD23, and CD28 in Bexar County. The Task Force, one of the principal Plaintiffs groups pursuing the nudge factor claim in CD23, stated that "[t]he restoration

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[79] As to the *Shaw* claim, to the extent race predominated in Plan C185, the district was redrawn in Plan C235. Even if race predominated in that redrawing, changes to the district were necessary to address intentional discrimination, and thus any use of race served a compelling state interest.

[80] As the Court noted, although Downton claimed to be trying to include more Hispanic Republicans, his method could also include precincts with low Hispanic turnout and high Anglo Republican turnout or higher Anglo bloc voting levels, and he failed to consider the Hispanic incumbent's chances in the Republican primary. Docket no. 1390 at 21 n.19.

of CD 23 in C226 [which became C235] addresses the Latino Task Force claim of intentional discrimination under the Constitution and §§ 2 and 5 of the Voting Rights Act." Docket no. 638 at 35.

Dr. Ansolabahere looked at the alterations made to CD23 in Plan C235 and the available information at the time to determine how the district was being reconfigured and if the changes "were fixing specific problems" in terms of increasing turnout or SSVR. Tr1060-61. He noted that although HCVAP was increased, the actual number of Spanish surnamed registered voters barely increased. Tr1061; Rod-955 ¶ 27 (the changes resulted in a net increase of only 243 SSVRs). He noted that this was an indication that maybe the areas being moved in were not going to perform to the level that they needed to in terms of participation. Tr1061. He further found that the areas moved into CD23 had lower turnout than the areas moved out of CD23, and that the movement of lower turnout areas into CD23 did not improve, and may have worsened, the electoral opportunities afforded to Hispanics in the district. Rod-955 ¶¶ 28, 30.

Dr. Ansolabahere acknowledged that Plan C235 fixed the Maverick County split and moved the entire County back into CD23, and that both HCVAP and SSVR were increased. Further, although he notes that areas moved into CD23 had lower turnout than areas moved out, his turnout analysis looked only at total turnout, not Hispanic or SSVR turnout, and did not compare Hispanic and non-Hispanic turnout differences. Tr1153.[81]

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[81] Dr. Ansolabahere looked at 2010 election turnout because that was the data available to the mapdrawer, but he agreed that

Dr. Flores's analysis examined the change in SSVR in Latino opportunity districts from 2008 to 2016, and found that the SSVR decreased slightly in CD23 (-0.2%). TF-20 at 3. But he found that it similarly decreased in CD20 (-0.5%) and CD35 (-0.9%). TF-20 at 2. Flores also found that "Latinos were more successful in increasing their number of votes cast when compared to non-Latino voters" but they "could not overcome the total turnout numbers of non-Latino voters." TF-20 at 7. He also found, based on the difference in turnout rates between Latinos and non-Latinos in the 2012 and 2016 general elections, that "[a]lthough Latinos have made gains closing the turnout gap in 2016 compared to 2012, the participation gap is still substantial at 15.8%." TFX-20 at 7-8.

In his conclusions, Dr. Flores notes that he previously pointed out the "difficulties that Latino candidates of choice would encounter because of the manner in which CD 23 was constructed by the Texas Legislature" in terms of turnout, and that Plan C235 "made some modifications to CD23 in Bexar County as an interim remedy." TF-20 at 12. He then states, "However, since 2012 the challenges facing Latino voters in CD23 have worsened with the increased level of bloc voting by non-Latinos against the Latino candidate of choice." *Id.*[82] But

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Defendants' 2016 election turnout analysis showed an overall increase in turnout. Tr1154-57; DX-808.

[82] As noted above, non-Latino bloc voting actually decreased between 2012 and 2014. Dr. Engstrom's analyses show that, between 2012 and 2014, both Latino and non-Latino support increased for Gallego. TF-19. In addition, both Anglo support and Latino support for the Hispanic-preferred candidate were higher in 2012 under Plan C235 than they were in 2010 under Plan C100. In 2010, Engstrom found 84.7% Latino and 18.1% non-Latino support for Rodriguez.

this fails to tie any of the current problems he identifies in CD23 to specific lines drawn in Plan C185. It is not enough to point to problems with CD23 in Plan C185 and problems with CD23 in Plan C235, without connecting the problems in Plan C235 to decisions made in Plan C185 and demonstrating specific continuing harms flowing from Plan C185. While Flores shows that Latinos continue to have a turnout gap compared to Anglo voters, that fact is true in most areas, if not statewide, and there is simply no evidence for the Court to conclude that the turnout gap in Plan C235 is the result of intentional discrimination in the mapdrawing process or carryover from Plan C185. And while the district may not perform as desired for Hispanic-preferred candidates, the Court finds no persuasive evidence that the lack of performance is the result of intentional discrimination in either 2011 or when the interim map was drawn in 2012.

Based on the foregoing, the Court finds that no changes are required to CD23.

VI. CD35 and CD27

The Rodriguez Plaintiffs contended that CD35 in Plan C185 was an impermissible racial gerrymander in violation of the *Shaw*-line of cases. And several Plaintiffs asserted that the removal of Nueces County from the "envelope" of South and West Texas Latino opportunity districts violated § 2 because Nueces County Hispanic

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Docket no. 307-1 at 25. In 2012, he found 86.9% Latino and 20.8% non-Latino support for Gallego. TF-19. Engstrom also estimated Latinos at 40.77% of the turned-out vote in 2010, while Flores found Latinos to be 46% of the turned-out vote in 2012. Docket no. 307-1 at 25-26; Flores Table 4 (92,997 Latino votes cast in 2012); Flores Table 5 (109,072 non-Latino votes cast in 2012).

votes were deprived of their opportunity to elect candidates of their choice. Hispanic voters in Nueces County who had been in benchmark Latino opportunity district CD27 asserted § 2 and Fourteenth Amendment claims based on the reconfiguration of CD27 in Plan C185, which placed them in an Anglo-majority CD27 oriented toward the north that was unquestionably no longer a Latino opportunity district.

The Court agreed that CD35 was an impermissible racial gerrymander because race predominated in its creation without furthering a compelling state interest. Although a new Latino opportunity district was required in South and West Texas, the Court found that mapdrawers' placement of significant population from Travis County into CD35 was not to substantially address the § 2 requirement, but to use race as a tool for partisan goals. Travis County does not have Anglo bloc voting and thus does not meet the third *Gingles* precondition, which mapdrawers knew, and placement of CD35 there was not to address § 2 concerns, but to intentionally destroy an existing district with significant minority population (both African American and Hispanic) that consistently elected a Democrat (CD25).[83]

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[83] Relatedly they intended that the CD25 incumbent, Lloyd Doggett, would lose any subsequent election in either CD25, which became a safe Republican district, or in a CD35 primary. Accordingly, they were willing to accommodate requests from Hispanic Democrat legislators from Bexar County to weight the district more heavily toward Bexar County. The result was the least compact district in the plan, designed not for a cohesive Hispanic voting bloc, but to allow Bexar County Hispanics to control elections, hopefully ousting Doggett, an Anglo, if he chose to run in the district. Defendants' plan

Simultaneously, mapdrawers removed Nueces County and its substantial Hispanic population from the South/West Texas configuration of districts, and placed it in an Anglo-dominated district going northward, not because they wanted these Hispanic voters to have influence in CD27 or because their rights could not be accommodated without other voters' § 2 rights failing to be accommodated, but because they would not vote for the newly elected Anglo Republican incumbent.[84] Placing

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was not realized, however, since Doggett secured re-election in CD35 despite it being designed to elect a Latino from Bexar County.

Several Plaintiffs also brought intentional discrimination claims based on the alleged intentional destruction of CD25 as a functioning crossover district. Because the *Shaw* equal protection violation would require district lines to be redrawn in Travis County, the Court did not reach that specific claim. Relatedly, Defendants have argued that Plaintiffs cannot establish a § 2 claim in Travis County related to the intentional destruction of alleged crossover district CD25 because the Court found no racially polarized voting in Travis County such that a crossover district would not be required to be drawn there. That argument misunderstands the nature of Plaintiffs' *Bartlett* claim, however. No party has asserted that § 2 requires a crossover district to be created in Travis County. Rather, certain plaintiffs are arguing that the intentional destruction of an existing crossover district, when done with racially discriminatory purpose, violates the Fourteenth and Fifteenth Amendments. While § 2 does not require states to draw crossover districts, a remedy for the purposeful destruction of an existing crossover district could include recreating the destroyed crossover district.

[84] Even Defendants' expert Dr. Alford agreed in the 2011 trial that CD27 was flipped from a Latino opportunity district to an Anglo-majority district to protect a candidate who was not preferred by the Hispanic voters. Tr1829, Tr1832, Tr1837. In *LULAC v. Perry*, 548 U.S. 399, 441 (2006), the Supreme Court noted that "incumbency protection can be a legitimate factor in districting," but "not all of [its forms are] in the interests of the constituents." Thus, "If . . .

them in the new Anglo-dominated CD27 would ensure that Anglo bloc voting would prevent them from electing their preferred candidate. Thus, although these Nueces County Hispanic voters had a § 2 right, had been in an opportunity district, and could have remained in one, they were intentionally deprived of their right to elect candidates of their choice.

In sum, the Court found that the Legislature violated § 2 in both result and intent, as well as the Fourteenth Amendment, by racially gerrymandering CD35 to replace CD25 and simultaneously impermissibly trading the § 2 rights of Nueces County Hispanic voters for those in Travis County, who lacked a § 2 right to a Latino opportunity district. The Court found that seven Latino opportunity districts were required in South and West Texas, and while the Legislature enjoys some discretion in creating such districts and not every voter who demonstrates a § 2 right has a corresponding right to be placed into an opportunity district,[85] the Legislature

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incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters. . . . This policy, whatever its validity in the realm of politics, cannot justify the effect on Latino voters." *Id.*

[85] In its Order on Plan C185, this Court stated that, "Where the rights of voters who have demonstrated § 2 violations can be accommodated through the use of compact districts that do not subordinate traditional redistricting principles more than necessary to address the § 2 liability, those voters' § 2 rights must be accommodated." Docket no. 1390 at 56. This was not meant to imply that any voter with a § 2 right must be placed into a § 2 district, or that Nueces County Hispanics would have had a right to be included in a Latino opportunity district under any circumstances. Rather, Plaintiffs demonstrated that seven compact Latino opportunity

intentionally did not substantially address the § 2 violation.

The exact same configuration of CD35 and CD27 remains in Plan C235. At the time the Court adopted Plan C235 as the interim plan, it did not alter the configuration of CD35 because it did not have the benefit of the full record and did not find that race predominated. In light of all the evidence and a full consideration of the record, the Court found that its preliminary conclusion concerning race predominance was erroneous. In conducting strict scrutiny review, the Court then determined that the placement of CD35 in Travis County was far from benign.

In addition, at the time the Court adopted Plan C235, it stated that the failure to place Nueces County Hispanics in a South Texas district did not diminish Hispanic voter opportunity for § 2 effects purposes, since whether they were included or not, no additional compact Latino opportunity district could be drawn. While this remains true, the Court's opinion on Plan C185 did not base its holdings on the mere failure to include Nueces County Hispanics in a § 2 Latino opportunity district, nor

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districts could be drawn and that § 2 required seven such districts, and the Legislature was required to accommodate those rights. If the Legislature had substantially addressed the requirement for seven Latino opportunity districts while still not including Nueces County, and there was no evidence of improper intent, this would be a different case, and Nueces County Hispanics would not have a right to inclusion in a Latino opportunity district. That is why, at the time the Court adopted the interim maps and had not yet found improper intent with regard to CD27 and CD35 and improper racial gerrymandering in CD35, it concluded that Nueces County Hispanics did not have a right to be placed into a Latino opportunity district. However, with the benefit of examination of the full record, that is not the case.

on a § 2 effects claim based on the failure to create additional Latino opportunity districts, the claim to which that statement was directed. Rather, the Court found that the Legislature intentionally diluted the vote of Nueces County Hispanics who would not support incumbent Farenthold, while simultaneously trading their § 2 rights to Travis County voters without a § 2 right.

The fact that seven HCVAP-majority districts were drawn in South and West Texas and that no more could be drawn simply does not resolve the issues. The Legislature racially gerrymandered to create the seven districts, yet *intentionally* failed to substantially address the § 2 violation that required those seven districts. The same facts exist and the same harms continue. Updated evidence indicates that there still is no Anglo bloc voting in Travis County, yet Travis County population makes up almost 31% of CD35. Tr1167 (Ansolabahere); JX-100.2. Using 2010 Census data, there are 215,626 individuals from Travis County included in CD35, about 140,800 of whom are Hispanics. JX-100.2. Dr. Ansolabahere testified that 220,000 Nueces County Hispanics are stranded in CD27, a district with 44.6% HCVAP. Tr1162-63.[86]

The Rodriguez Plaintiffs maintain their *Shaw*-type claim against CD35, and their intentional discrimination claim related to the destruction of CD25. Docket no. 1524 at 3 & n.8.[87] The Rodriguez Plaintiffs note that the lines of CD35 have not changed, that it remains the least compact

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[86] Nueces County is now 57.55% HCVAP; there are 218,400 Hispanics in Nueces County, 205,990 Hispanic citizens, and 142,230 HCVAP. Tr1163; D-702.

[87] Other Plaintiffs, including MALC and the NAACP Plaintiffs, also maintain claims related to the intentional destruction of CD25.

district in the state, and that the same population suffers from the State's unjustified race-based classification in Plan C235. Docket no. 1254 at 13. The Rodriguez Plaintiffs also correctly point out that discriminatory intent is not an element of a *Shaw*-type racial gerrymandering claim, and thus the only inquiry remains whether race predominated in the decision to place a significant number of voters within and without the district and, if so, whether strict scrutiny is satisfied. Because the lines of CD35 remain identical to the lines in CD35, Rodriguez Plaintiffs note that the evidence is largely the same. Docket no. 1254 at 14.

Defendants contend that, although this Court found CD35 to be an unconstitutional racial gerrymander in Plan C185 and CD35 remains unchanged in Plan C235, there is no unconstitutional racial gerrymander in Plan C235 because the Legislature "did not draw the boundaries of any district" and "did not make a 'decision to place a significant number of voters within or without a particular district.'" Docket no. 1526 at 85. As discussed above, this argument lacks merit, as it improperly focuses on the re-enactment of a plan containing CD35, rather than the decision as to which voters to place within and without the district at the time that decision was made (in 2011).

Although Plan C235 was enacted in 2013, the decision as to which voters to include within CD35 was made in 2011, and that remains the proper time for evaluating the district under *Shaw*. Otherwise, a Legislature could always insulate itself from a *Shaw*-type challenge simply by re-enacting its plan and claiming that it made no decisions about who to include in the district at the time of re-enactment. There is no evidence that the Legislature

again considered in 2013 which persons to include within CD35 (and Defendants deny that any such decisions were made in 2013), or that it considered any evidence to provide a strong basis in evidence that did not previously exist in 2011. Rather, as the Court found above, it maintained these aspects of Plan C235 in spite of the possibility that such infirmities remained. Thus, this Court's prior findings and conclusions concerning CD35 remain equally applicable to Plan C235.

With regard to the Nueces County and CD27 claims,[88] the Court found that these Hispanic voters were intentionally deprived of their opportunity to elect a candidate of their choice, which they likely would have done in the next election given that Hispanic turnout is greater in presidential election years, and that their rights were essentially traded to Hispanics in Travis County without a § 2 right. There is no evidence that the Legislature engaged in any meaningful deliberation in 2013 to cleanse away such discriminatory intent, and in fact they intended to maintain any such discrimination, purposefully intending to deprive plaintiffs of any remedy.[89]

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[88] MALC, the Perez Plaintiffs, the Quesada Plaintiffs, LULAC, and the Rodriguez Plaintiffs maintain claims against CD27 in Plan C235 on behalf of Nueces County Hispanic voters. MALC's membership includes Abel Herrero, who represents and lives in HD34 in Nueces County. MALC-1.

[89] Plaintiffs' most recent demonstration plans split Nueces County to accommodate the Legislature's goal of protecting incumbent Farenthold within CD27. All of Nueces County can be placed into a Latino opportunity district, but the county is split to place Farenthold in an Anglo-majority district. To the extent such a split might be objected to as failing to respect county boundaries, that

Therefore, the Court holds that the Plan C235 configurations of CD35 and Nueces County/CD27 remain violations of § 2 and the Fourteenth Amendment and must be remedied.

Plan C235 Summary and Conclusions

In Part II, the Court concludes that the racially discriminatory intent and effects that it previously found in the 2011 plans carry over into the 2013 plans where those district lines remain unchanged. The discriminatory taint was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and infact intended any such taint to be maintained but be safe from remedy. The Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans.

In Part IIIA, the Court concludes that Plaintiffs' § 2 results claims in the DFW area fail for lack of proof of African-American and Hispanic cohesion. In Part IIIB, the Court finds that the intentional discrimination found in DFW in Plan C185 is remedied in Plan C235, and that Plaintiffs failed to prove that any alleged cracking and packing that remains in DFW was intentionally dilutive.

In Part IV, the Court concludes that Plaintiffs' § 2 results claims in the Houston area fail for lack of proof of African-American and Hispanic cohesion.

In Part V, the Court finds that CD23 is a Latino opportunity district and there is no evidence of intentional discrimination/dilution.

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traditional redistricting principle is not being subordinated to race, but to the Legislature's goal of protecting Farenthold.

In Part VI, the Court concludes that the Plan C235 configurations of CD35 and Nueces County/CD27 violate § 2 and the Fourteenth Amendment. These statutory and constitutional violations must be remedied by either the Texas Legislature or this Court.

It is therefore ORDERED that the Office of the Attorney General file a written advisory within three business days stating whether the Legislature intends to take up redistricting in an effort to cure these violations and, if so, when the matter will be considered.

If the Legislature does not intend to take up redistricting, the Court will hold a hearing to consider remedial plans beginning on **September 5, 2017 at 8:30 a.m.** in Courtroom 1. In preparation for the hearing, the parties must take immediate steps to consult with their experts and mapdrawers and prepare statewide congressional plans that remedy the violations found in CD35 and CD27 yet minimize the effect on adjoining districts.

The parties must confer and address objections and concerns, to the extent possible, prior to the hearing. If both sides agree upon a remedial plan, they should notify the Court, but the hearing will nevertheless proceed so the parties can present the plan on the record. If the parties cannot agree, they should be prepared to offer, support, and defend their proposed remedial plan(s) at the hearing. Plaintiffs and Defendants will be permitted to offer up to four alternative remedial plans per side, and Plaintiffs may (but are not required) to jointly offer plan(s). The plaintiffs who asserted and prevailed on their claims against CD35 and Nueces County/CD27 (MALC and the Rodriguez plaintiffs (proceeding jointly with the LULAC and Perez plaintiffs)) should take the lead in

drawing and proposing any remedial plans, and the remaining plaintiffs (NAACP, Latino Redistricting Task Force, Congressman Cuellar, and the Quesada plaintiffs) may participate in an advisory role and assert any objections or concerns they may deem appropriate.

The parties should consult with Texas Legislative Council, to the extent necessary, to upload their proposed remedial plans into DistrictViewer and ensure that all relevant data is available to all parties and the Court. If the parties intend to rely on data or analysis that is not available through TLC, they must provide that data to all other parties as soon as that data is available.

It is further ORDERED that Texas Legislative Council staff be present at the remedial hearing for technical assistance in the parties' presentation of their proposed plans through DistrictViewer or other available means.

Because this order only partially addresses the issues herein – the violations in C235 – it is interlocutory. The Court bifurcated the remedial phase, which will commence as scheduled herein. The Court must also address the alleged violations in H358 and, if necessary, a remedial plan for the Texas House.

SIGNED this 15th day of August, 2017.

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
on behalf of the panel

APPENDIX C

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-Cv-360
	§	
GREG ABBOTT, ET AL.	§	

AMENDED ORDER*

Before Circuit Judge SMITH, Chief District Judge GARCIA, and District Judge RODRIGUEZ

Circuit Judge Smith, dissenting

XAVIER RODRIGUEZ, District Judge and ORLANDO L. GARCIA, District Judge:

This Order addresses Plaintiffs' claims against the plan for the United States House of Representatives ("congressional plan" or "Plan C185") enacted by the Texas Legislature in 2011, following a full trial on the

claims.[1] Plaintiffs mount both statewide claims[2] and regional claims, specifically in the South/West Texas area, Dallas-Fort Worth area, and Houston area, under § 2 of the Voting Rights Act ("VRA") and the Fourteenth Amendment to the United States Constitution.[3]

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* This Order clarifies the March 10, 2017 Order (docket no. 1339) in the following respects: (1) On page 5, the Court notes that whether Plaintiffs are continuing to be harmed by violations found with regard to CD23 remains undecided; (2) On page 72 footnote 67, the Court clarifies that the Court's holding that the Task Force Plaintiffs failed to establish a § 2 results claim based on the failure to draw a Latino opportunity district in DFW does not preclude Plaintiffs who have pleaded such a claim from pursuing their § 2 results claims based on the failure to draw an additional Latino opportunity district in DFW in Plan C235; (3) On page 76, the Court clarifies that it does not decide whether post-enactment population projections such as Fairfax's can or should be used to evaluate *Gingles* results claims.

[1] This Order is designed to be read in conjunction with the Court's fact findings, which are issued separately.

[2] Plaintiffs assert statewide claims under § 2, which the Court considers in terms of whether Plaintiffs have shown that more minority opportunity districts were required than were included in Plan C185 and whether minorities have proportional representation. However, because the analysis necessarily focuses on whether additional districts could have been drawn in specific areas, the Court finds that conducting the analysis in terms of specific geographic areas is necessary.

[3] Plaintiffs' Fifteenth Amendment and partisan gerrymandering claims were disposed of prior to trial. Docket no. 275, 285. This Court granted summary judgment on the Fifteenth Amendment claims, holding that the law does not recognize a claim under the Fifteenth Amendment for vote dilution. Docket no. 275 at 17. On the political gerrymandering claims, the Court found that the claims were justiciable, but because Plaintiffs had not identified a reliable standard by which to measure the redistricting plan's alleged burden on their representational rights, the Court was required to grant

Before turning to the merits, the Court will again explain why the 2011 plan claims are not moot and a determination on the merits of those claims is required. This Court thoroughly explained its reasoning in its September 6, 2013 Order (docket no. 886). Specifically, in rejecting Defendants' argument that the 2011 plans posed no threat and any order on those plans could provide no effectual relief, the Court reasoned: (1) it was Defendants' burden to prove mootness; (2) Defendants failed to meet their burden of demonstrating that the conduct alleged to violate § 2 and the Constitution with regard to the 2011 plans could not reasonably be expected to recur; (3) the fact that a challenged law is amended does not alone moot the underlying claim unless the law has been sufficiently altered so as to present a substantially different controversy; (4) the 2013 plans are heavily derived from the 2011 plans, and Plaintiffs contend that many of the alleged violations of the VRA and the Constitution initially enacted in 2011 persist in the 2013 plans, though some perhaps to a lesser degree; (5) although the new plans may disadvantage Plaintiffs to a lesser degree, they disadvantage them in the same fundamental way such that Plaintiffs are still suffering injury from the 2011 plans, even if they are technically repealed; (6) there is no indication that the Legislature would not engage in the same conduct that Plaintiffs assert violated their rights in upcoming redistricting cycles; (7) because Texas refused to concede the illegality of any conduct, a dispute remains

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judgment on the pleadings pursuant to Supreme Court precedent. Docket no. 285 at 19-22. *But see Whitford v. Gill*, 15-cv-421-bbc, 2016 WL 6837229 (W.D. Wis. Nov. 21, 2016) (finding for plaintiffs on political gerrymandering claim).

over the legality of the challenged practices and there is no assurance that the conduct will not recur, and Plaintiffs maintain a personal stake in the controversy; and (8) there remains the possibility of declaratory and equitable relief under § 3(c) for some claims. All three members of this Court agreed with this reasoning.

However, after the Fifth Circuit issued its decision in *Davis v. Abbott*, 781 F.3d 207 (5th Cir. 2015), in which the Court stated that the 2011 Senate Plan lawsuit had become moot, Defendants again argued that the 2011 House and congressional plan claims were moot. Docket no. 1310. Defendants argued that the Fifth Circuit's mootness conclusion was necessary to its decision that Texas waived its opportunity to seek vacatur of this Court's interim-relief orders in light of *Shelby County v. Holder*, and that the Fifth Circuit's holding "bears directly on this Court's jurisdiction over claims against the Texas Legislature's 2011 House and congressional redistricting plans." Docket no. 1310 at 23-24. "At the very least," Defendants argued, "*Davis* implies that the Plaintiffs' claims are moot if they challenge districts that were, like Senate District 10, modified by the Court and later adopted in modified form by the Legislature." *Id.* at 25. However, *Davis v. Abbott* does not change the Court's conclusion that most of the 2011 plan claims are not moot.

Davis v. Abbott was not a decision about mootness; it concerned whether the plaintiffs in the 2011 Senate Plan case were prevailing parties entitled to fees and costs. It did not announce a new rule of law or change the legal landscape concerning mootness. Thus, the only basis upon which it could change this Court's prior conclusions and bind this Court on mootness is if it is factually indistinguishable from this case. But it is not.

As a preliminary matter, the Court notes that the case against the 2011 Senate Plan was not consolidated with the House and congressional plans, and it remained a separate case (5:11-CV-00788). It also involved a very limited set of claims, unlike the House and congressional plan cases. At the interim remedy stage, the proposed compromise plan[4] approved by this Court under the applicable standard set forth in *Perez v. Perry* resolved all of the plaintiffs' claims. *See* docket no. 190 (final judgment noting that Plan S172 "restored [Senate] district 10 to near benchmark configuration and remedied the constitutional infirmities being asserted"). Plaintiffs *agreed* that the interim Plan S172 did not violate the VRA or the Constitution. Thus, when the Legislature adopted that plan in 2013, no plaintiff was complaining that infirmities remained in the plan or alleged that they were still suffering injury from the repealed 2011 plan, and no plaintiff sought to amend their pleadings to pursue § 3(c) relief. When the Fifth Circuit decided that the 2011 plan claims were moot, it was therefore operating under substantially different facts, and it was *not* addressing the House or congressional plan claims when it referred to "the lawsuit" becoming moot.

In this case, in contrast, numerous alleged infirmities from the 2011 plans remained in the interim plans that Plaintiffs contended were continuing to injure them. Unlike in the Senate plan, many asserted VRA and constitutional infirmities were *not* remedied in the interim

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[4] The plan was submitted by the plaintiffs, and the defendants indicated in open court that they had no objection to entry of an order directing that Plan S172 be used on an interim basis. Docket no. 147 at 2.

plans, and thus the injuries were alleged to persist in the 2013 plans. Thus, there was not only a possibility that Defendants would continue to engage in conduct that Plaintiffs claimed violated the VRA or the Constitution, Defendants were continuing to engage in exactly such conduct when they adopted the interim plans in 2013. The fact that this Court finds that mapdrawers acted with an impermissible intent to dilute minority voting strength or otherwise violated the Fourteenth Amendment and that Plaintiffs are still being harmed by the lines drawn as the direct product of these violations demonstrates that many of Plaintiffs' claims against the 2011 plans are not moot. Specifically, Plaintiffs contend that they continue to be harmed by violations of the VRA and Fourteenth Amendment in CD23, CD27, and CD35. The configurations of CD35 and CD27 remain unchanged in Plan C235, and whether the harms found regarding CD23 continue in Plan C235 remains to be decided.

While Defendants undoubtedly would prefer that we address those infirmities only in the context of the 2013 legislative session and the plans adopted therein, doing so would potentially deprive Plaintiffs of a remedy tied to that 2011 injury—the § 3(c) remedy. Confining the analysis to the 2013 plan claims would significantly impact the intent analysis for Plaintiffs' intentional vote dilution claims given the involvement of a different Legislature and Defendants' assertion that they could have no such discriminatory intent by simply adopting the Court's interim plans. Plaintiffs should not have to jump through additional hoops to prove that the 2011 mapdrawers' intent carried forward to the 2013 Legislature when Plaintiffs' fundamental claims are that the 2011 mapdrawers acted with discriminatory intent, Plaintiffs

are still being harmed by the districts drawn with that intent, and Plaintiffs have potential relief available under § 3(c) for that harm. Nothing in *Davis v. Abbott* requires a contrary conclusion.

While it is possible that *Davis* implies "at the very least," that the remedied claims are moot, the Court still finds *Davis* distinguishable based on the possibility of § 3(c) relief for certain claims.[5] Because Plaintiffs are still seeking relief under § 3(c) for certain claims, the Court holds they are not moot even where the districts were altered. As discussed below, however, the Court does agree that the remedied § 2 *results* claims are moot.

I. South/West Texas claims

Plaintiffs contend that § 2 requires that there be seven (and some Plaintiffs argue eight) Latino opportunity districts in the combined areas referred to as South/West Texas. Plaintiffs also contend that Nueces County Hispanics have a § 2 right and should be included in one of those minority opportunity districts, and most Plaintiffs contend that Travis County should not be included. Plaintiffs (other than the Task Force Plaintiffs) contend that CD35, the new HCVAP-majority district that connects portions of Austin and San Antonio, is not a valid § 2 district because it is not compact and because it includes Austin/Travis County, where the *Gingles* preconditions are not satisfied because there is no racially

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[5] The Court does not imply that such relief is or is not available or will be granted; those issues remain to be determined. However, Plaintiffs are seeking such relief and, as this Court previously concluded, "Plaintiffs' claim for § 3(c) relief is certainly not so implausible that it is insufficient to preserve jurisdiction." Docket no. 886 at 15.

polarized voting. And Plaintiffs contend that CD23 is no longer a Latino opportunity district despite its HCVAP-majority status.

Defendants contend that Plan C185 has the number of HCVAP-majority districts in South/West Texas that could be required by § 2 (seven districts), and that the State has discretion in deciding their location based on political and other factors, and thus there is no § 2 violation. Although Plaintiffs acknowledge that Plan C185 contains seven HCVAP-majority districts in South/West Texas, they assert that it does not contain seven Latino opportunity districts, and they assert that Plan C185 does not sufficiently remedy the § 2 violation.

A. Whether there should be eight Latino opportunity districts in South/West Texas?

Some Plaintiffs offered demonstration maps with eight HCVAP-majority districts in South/West Texas. The Supreme Court has recognized that a redistricting scheme may violate § 2 by impermissibly diluting the minority's potential to elect, and has established three threshold requirements for such a vote dilution claim (in the absence of intentional discrimination). The first factor requires that the relevant minority is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

As this Court noted in its March 2012 order, Plans C188 and C211 include a proposed district that stretches from south Hidalgo County all the way to north Travis County, and the Supreme Court ruled that a nearly identical district in the same location was "noncompact for § 2 purposes." *LULAC v. Perry*, 548 U.S. 399, 435 (2006).

In *LULAC*, the Supreme Court emphasized that it was the combination of the "enormous geographical distance" between the Austin/Travis County and Mexican-border communities in McAllen/Hidalgo County, coupled with "the disparate needs and interests of these populations," that rendered the district non-compact for § 2 purposes. *Id.* The Court noted that 77% of the population of the district resided in Hidalgo and Travis Counties, on either end of the district. *Id.* at 424. Although this number is reduced to 69% in CD10 in Plan C188 and to 73% in CD33 in Plan C211, the basic problem with the proposed districts remains the same. Thus, these plans are foreclosed by *LULAC v. Perry* and fail to demonstrate that an additional compact opportunity district could be drawn in South/West Texas.

LULAC demonstration plan C262 proposes a district (CD28) that connects rural southwest Texas counties (Webb, Dimmit, and Maverick Counties) with parts of Bexar County and northeastern Travis County. Plan C261 includes a similar district (also CD28) that extends farther south and connects parts of Starr County with parts of Bexar and Travis Counties. Although these districts are unlike the district found noncompact in *LULAC v. Perry* insofar as the population is more evenly dispersed among the various counties in the districts[6] the districts still span a very large distance and connect

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[6] In Plan C261, approximately 2% of the CD28 population is in Starr County on one end, 17% is in Travis County on the other end, 36% is in Webb County, and 10% is in Bexar County. In Plan C262, 36% of the CD28 population is in Webb County and 8% in Maverick County at one end, 17% in Travis County on the other end, and 8% in Bexar County.

Hispanic populations in Travis/Hays and Bexar Counties with border communities that seem to have little in common with those populations. Although the Court could perhaps find them to be compact if sufficient evidence were presented, Plaintiffs have not proffered any basis for joining these various populations aside from race to show that this is a compact minority population, taking into account traditional districting principles and communities of interest.[7]

In addition, Plans C261 and C262 create a long, thin district CD27 that spans from Hidalgo County to Wharton County near Houston, and another long district CD15 running alongside CD27 that joins part of Hidalgo County with Jackson County. Although the Court is aware that sparser population in some south and southwest Texas counties results in larger districts spanning longer

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[7] LULAC also presented partial plans C256 and C259 during the 2014 trial on the congressional plan. These plans include a proposed South Texas Latino opportunity district (CD28) that spans from Hidalgo County to Hays County (there are only slight variations in Hidalgo, Wilson, and Hays Counties in these two maps) and a Travis County-based, Anglo-CVAP-majority CD25 (proposed as a tri-ethnic coalition district), as well as eight HCVAP-majority districts. LULAC's counsel referred to Plans C256 and C259 in his closing argument, TrA1970, but he proffered no evidence concerning these plans at trial other than the plan maps and data. LULAC's expert George Korbel (who drew these plans) testified that they "fixed" CD23 and created an additional district out of Corpus Christi that would be very similar to the Corpus Christi district (CD27) under the benchmark plan, but he otherwise did not testify about these plans or discuss the proposed district. TrA1211. *See Rodriguez v. Harris Cty.*, Tex., 964 F. Supp. 2d 686, 738 (S.D. Tex. 2013) (noting that it is plaintiffs' burden to put on some evidence of geographical compactness for § 2 purposes).

distances, Plaintiffs have offered no justification for the creation of such long and narrow districts joining these various populations, other than race. Further, Plan C262 (Korbel's preferred map) creates a CD16 joining El Paso with ten other West Texas counties in a significant deviation from its prior compact configuration in El Paso County, and again there is no evidence in the record demonstrating that joinder of these communities has any basis besides achieving a 50% HCVAP population.[8] Without any additional information, the Court is unable to determine whether the minority populations contained in such districts are compact for § 2 purposes: The fact that the Legislature's enacted map contains three such "fajita strip" districts does not relieve Plaintiffs of their obligation to produce evidence showing that *their* proposed *Gingles* demonstration districts are compact for § 2 purposes.[9] Thus, these plans fail to demonstrate that

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[8] The Rodriguez Plaintiffs objected to a similar El Paso district proposed by MALC in Plan C211. Docket no. 465 at 17.

[9] In his 2014 closing argument, Mr. Garza stated that plaintiffs "presented testimony both through Dr. Kousser and Mr. Korbel that measured the compactness of [the proposed HCVAP-majority districts in Plan C262] based on the measures contained in the RedAppl utility. Mr. Korbel testified that those districts in 262 were comparable to the compactness of districts – in 185." TrA2129. The Court has not located any testimony from Mr. Korbel about the compactness of the South/West Texas districts in Plan C262. The plan data submitted with Plan C262 includes the compactness analysis using area rubber band and perimeter-to-area measurements from RedAppl, but these measurements were not discussed at trial. Korbel did state that using compactness measurements "is a way to compare the different plans" and "one of the things that I think is important is, are the plaintiffs' plans within – within the rangeof compactness that the State plan is." TrA1215. However, he never actually

an additional compact Latino opportunity district could be drawn in South/West Texas.

B. Plaintiffs' claims and proposed maps with seven HCVAP-majority districts in South/West Texas

Given the Court's conclusion that Plaintiffs have failed to demonstrate that § 2 requires more than seven HCVAP-majority districts in South/West Texas, the Court must initially determine whether Plaintiffs may bring a § 2 claim against a map such as Plan C185 that has seven HCVAPmajority districts in South/West Texas. If so, the Court must relatedly determine whether CD23 and CD35 in Plan C185 are Latino opportunity districts required or permitted by § 2 and whether Nueces County Hispanics have established a § 2 claim.

Defendants contend that Plaintiffs must show that more HCVAP-majority districts could have been drawn than were included in Plan C185, and because they fail to do so, they cannot bring a § 2 claim. Defendants point to *Johnson v. De Grandy*, 512 U.S. 997 (1994), in which the Supreme Court stated that, "[w]hen applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Id.* at 1008. However, the dispute in *De Grandy* centered on "whether Hispanics are

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compared Plan C262 with Plan C185 interms of compactness scores. In addition, the State's enacted plan contains many non-compact districts due to its highdegree of gerrymandering, and thus the compactness of districts in Plan C185 is not, standing alone, an adequate basis for assessing the compactness of Plaintiffs' proposed districts for § 2 purposes.

sufficiently numerous and geographically compact to be a majority in additional single-member districts" and "whether, even with all three *Gingles* conditions satisfied, the circumstances in totality support a finding of vote dilution when Hispanics can be expected to elect their chosen representatives in substantial proportion to their percentage of the area's population." *Id.* at 1007-08.

This case does involve claims that Plaintiffs are entitled to an additional HCVAP-majority district in South/West Texas, as discussed above in relation to certain Plaintiffs' claim that there should be eight HCVAP-majority districts in South/West Texas. But Plaintiffs *also* claim that § 2 requires seven Latino opportunity districts in South/West Texas, and Plaintiffs challenge whether the HCVAP-majority districts in Plan C185 are appropriate Latino opportunity districts and whether they sufficiently comply with § 2. The Supreme Court has repeatedly emphasized that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Id.* at 1007 (citing *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993)). The Supreme Court has never held that a State's creation of a certain number of HCVAP-majority districts forecloses all relief, and nothing in the Supreme Court's precedents indicates that Plaintiffs may not still challenge whether the enacted districts comply with § 2 and are Latino opportunity districts, whether they appropriately and adequately address Plaintiffs' § 2 rights, and/or whether they comply with the Equal Protection Clause. In fact, *Shaw v. Hunt*, 517 U.S. 899, 916 n.8 (1996), indicates that Plaintiffs may challenge whether the minority districts drawn in the State's plan were lawfully drawn, and that the rule of *Johnson v. De Grandy* applies only when the

State's districts are lawfully drawn (or presumed to be).[10] Thus, while Plaintiffs may not have submitted sufficient proof that they are entitled to eight HCVAP-majority districts in South/West Texas, they have shown that they are entitled to seven such districts, and they may assert claims under *Shaw* and § 2 against the districts in Plan C185. The Court thus turns to those claims.

1. CD23 § 2 claims

Plaintiffs claim that CD23 in Plan C185 is not a Latino opportunity district. Defendants assert that it is, noting that both Spanish Surname Voter Registration ("SSVR") and HCVAP increased from the benchmark and both are over 50% (54.1%/54.8% and 58.5% respectively). Thus, Defendants argue, the district provides an opportunity for a politically cohesive Hispanic voting population to overcome any equally cohesive Anglo voting bloc. Docket no. 1250-1 at 14. Defendants also take the position that a 50.1% majority-HCVAP district is by definition an

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[10] The Court wrote, "Justice STEVENS in dissent argues that it does not matter that District 12 could not possibly remedy a § 2 violation because he believes the State's plan would avoid § 2 liability. As support, Justice STEVENS relies on our decision in *Johnson v. De Grandy*, 512 U.S. 997, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994),which he reads to say that 'a plaintiff cannot make out a prima facie case of vote dilution under § 2 unless he can demonstrate that his proposed plan contains *more* majority-minority districts than the State's.' The dissent's reading is flawed by its omission. In *De Grandy*, we presumed that the minority districts drawn in the State's plan were lawfully drawn and, indeed, we expressly stated that a vote dilution claim under § 2 'requires the possibility of creating more *than the existing number of reasonably compact districts* with a sufficiently large minority population to elect candidates of its choice.'" (emphasis in original) (some citations omitted).

opportunity district regardless of its projected election performance or other factors because, if minority voters will "pull, haul, and trade," they can control the district. Therefore, Defendants reason, because CD23 is majority HCVAP, it is an opportunity district.

Plaintiffs and their experts contend that election performance and other factors (as opposed to mere population statistics) determine whether a district is an opportunity district, and most of the experts contend that a district is not a Latino opportunity district unless Latinos can win 50% of the time or more on an exogenous statewide election index. As discussed below, the Court does not agree with either side's position, but finds that proposed CD23 in Plan C185 was not intended to be and is in fact not a Latino opportunity district despite its majority-HCVAP status.

First, the Court rejects Defendants' bright-line rule that any HCVAP-majority district is by definition a Latino opportunity district. Although some courts have applied such a rule and held that § 2 challenges may not be raised to a majority-minority district,[11] that appears to be a minority view. In fact, Justice Kennedy recognized that a majority-HCVAP district may still lack "real electoral opportunity." *LULAC*, 548 U.S. at 428 (Kennedy, J.); *see also Bartlett v. Strickland*, 556 U.S. 1, 39-40 (2009) (Souter, J., dissenting) ("[E]ven when the

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[11] For example, in *Jeffers v. Beebe*, 895 F. Supp. 2d 920 (E.D. Ark. 2012), the court relied upon the bright-line 50% threshold for plaintiffs to prove the first *Gingles* condition and Supreme Court cases stating that § 2 does not require maximization or electoral advantage to hold that a plaintiff may not establish a claim for § 2 vote dilution when the challenged district is already majority-minority under *Bartlett*'s definition.

50% threshold is satisfied, a court will still have to engage in factually messy enquiries about the 'potential' such a district may afford, the degree of minority cohesion and majority-bloc voting, and the existence of vote-dilution under a totality of the circumstances.").

Although no Supreme Court decision explains when a majority-HCVAP district lacks "real electoral opportunity," some lower courts have considered this issue and, consistent with Justice Kennedy's observation, have recognized that the majority-minority status of a district does not preclude a § 2 claim. For example, in considering a plan in which all five districts were majority-African American (though in terms of registered voters "blacks would have exceedingly slim majorities in some of these districts and minorities in others"), the Fifth Circuit noted that "[t]he mere existence of a black population majority does not preclude a finding of dilution." *Moore v. Leflore Cty. Bd. of Election Comm'rs*, 502 F.2d 621, 624 (5th Cir. 1974) (citing *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc) (rejecting claim that "an at-large scheme cannot work a dilution of black voting strength where blacks, though constituting a minority of registered voters, comprise a majority of the total population of the parish" because although population is the proper measure of equality in apportionment, access to the political process and not population is the barometer of dilution of minority voting strength)). The Court recognized that the history of fear and civil rights repression resulted in minimal political activity for African Americans such that drawing a district that retained "the barest of black population majorities . . . enhanced the possibility of continued black political impotence." *Id.* The Fifth Circuit therefore

affirmed the district court's rejection of such a plan in favor of a plan with four districts with greater black majorities such that "[b]lack voters [were] therefore far more likely to be able to exercise their franchise in a full and meaningful way." *Id.* at 625.

Later, in *Salas v. Southwest Texas Junior College District*, 964 F.2d 1542, 1547 (5th Cir. 1992), the Fifth Circuit held that even when a protected group is the registered voter majority, it may seek relief in a vote dilution case; the question would be one of proof. The Court recognized that "access to the political process, aside from population statistics, is the criteria by which a court determines illegal or unconstitutional vote dilution." *Id.* at 1549. Thus, whether dilution exists is determined as part of the totality of circumstances, peculiarly dependent on the facts of each case. *Id.* at 1551.

As Dr. Lichtman noted, demographics alone do not demonstrate opportunity; the degree of racially polarized voting and turnout will affect whether an HCVAP-majority district provides opportunity, such that a searching, practical inquiry is required. Tr1226-27, Tr1258. *Gingles* established that the majority-HCVAP requirement is the minimum threshold a § 2 plaintiff must demonstrate because otherwise that plaintiff cannot show potential to elect as a matter of law,[12] but the existence of

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[12] The Supreme Court has held in the context of claims involving the failure to create opportunity districts that if minority voters cannot demonstrate at least a potential to elect, then voters challenging a structure as diluting their ability to elect cannot claim that the challenged structure or practice is responsible for their inability to elect. *Gingles*, 478 U.S. at 50. For § 2 results claims, *Gingles* and *Bartlett* define potential to elect as having majority-minority CVAP population in a district.

a majority HCVAP in a district does not, standing alone, establish that the district provides Latinos an opportunity to elect, nor does it prove non-dilution. In other words, it is a necessary but not always sufficient requirement for opportunity under *Gingles*.

As part of the "totality of circumstances" analysis, courts consider two factors that focus on the effect of past discrimination on minority groups' ability to participate in the political process: (1) the history of voting-related discrimination in the State or political subdivision; and (2) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process. *Clark v. Calhoun Cty., Miss.*, 88 F.3d 1393, 1399 (5th Cir. 1996) (citing *Gingles*, 478 U.S. at 44-45). In *Salas*, the Fifth Circuit also directed courts to consider whether voting is polarized along racial lines and whether the inability of the protected class to elect was caused primarily by racial bloc voting or instead by other circumstances that the VRA does not redress. *Salas*, 964 F.2d at 1554-55. Looking to the totality of circumstances, it held that a protected group may attempt to prove that its registered voter majority is "illusory" because of errors or shortcomings with the registered voter data, because of practical impediments to voting, or because low turnout at elections was the result of prior official discrimination. Id. at 1555. However, a protected class is not entitled to § 2 relief merely because it turns out to vote in a lower percentage than non-protected voters. *Id.* at 1556.

The Second Circuit considered this issue in *Pope v. Albany County*, 687 F.3d 565 (2d Cir. 2012). The court recognized that a majority-minority CVAP population

means that, by definition, if the majority voters are cohesive, they have the opportunity to control the outcomes of elections. *Id.* at 575-76. However, low voter registration and turnout rates may mean that this opportunity cannot be realized, and "low voter registration and turnout rates raise questions that go beyond the merely statistical because, as the Supreme Court has recognized, such circumstances may sometimes be 'traceable, at least in part, to [a] historical pattern of . . . official discrimination.'" *Id.* at 575 n.8. As a result, "the law allows plaintiffs to challenge legislatively created bare majority-minority districts on the ground that they do not present the 'real electoral opportunity' protected by Section 2." *Id.*[13]

The Seventh Circuit embraced this same principle in *Ketchum v. Byrne*, 740 F.2d 1398, 1413 (7th Cir. 1984), a case that predates *Gingles*. In *Ketchum*, the district court had determined that in fashioning a remedial district, a bare majority constituted an effective majority for minority groups because "there is no statistical or objective evidence in the record that a minority is entitled

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[13] The Second Circuit held that a plaintiff may satisfy the first *Gingles* factor simply by meeting the 50.1% CVAP requirement, and that the size of the minority population in the district "may well be among the totality of circumstances that can inform the ultimate determination of vote dilution and the appropriate remedy." *Pope*, 687 F.3d at 574. Thus, the majority-CVAP requirement still serves a useful gate-keeping role by identifying, in broad terms, when a minority group has at least "the potential to elect representatives in the absence of the challenged structure or practice" and "serves at the outset to screen out cases in which there is no point in undertaking a full Section 2 analysis." *Id.* at 575 & n.10. "Toward that end, it asks a preliminary question; it does not attempt to answer the ultimate one." *Id.*

to or should have more than a majority of the voting age population in order to have a reasonably fair opportunity to vote for candidates of their choice or even to elect candidates of their choice." *Id.* at 1411 (citing the trial record of the lower court). But the court of appeals disagreed, explaining that the district court failed to consider "voter registration and turn-out patterns in the Hispanic and black communities" in determining whether there was a reasonable opportunity to elect. *Id.* at 1413.

Thus, while an HCVAP-majority always provides a *theoretical* opportunity, courts and experts in the field have phrased the § 2 requirement (for both liability and remedy in many instances) as providing "realistic opportunity," "reasonable opportunity," "practical opportunity," "effective opportunity," and like terms. *E.g.*, *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1023 (8th Cir. 2006) ("[A]ll that is required is that the remedy afford Native-Americans a realistic opportunity to elect representatives of their choice."); *Kirksey v. Bd. of Supervisors of Hinds Cty., Miss.*, 554 F.2d 139, 150 (5th Cir. 1977) ("These figures, adjusted upward to a skin-of-the-teeth 'maybe so' 50% of voting age population, were coupled with inconsistencies in predicting bloc voting patterns to support the inference of 'realistic opportunity.'"); *see also Bartlett*, 556 U.S. at 29 n.2 (Souter, J., dissenting) ("§ 2 simply provides that, subject to qualifications based on a totality of circumstances, minority voters are entitled to *a practical chance* to compete in a roughly proportionate number of districts.") (emphasis added).[14]

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[14] Although in past practice some courts have imposed a 60 or 65% minority population rule to ensure an effective opportunity, this

A "real opportunity" is not a guarantee of success, as the Court is mindful that § 2 does no guarantee electoral success for minority-preferred candidates. *LULAC*, 548 U.S. at 428 ("We have said that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.") (citation omitted).[15] Along those lines, the Court rejects Plaintiffs' position that a district provides opportunity only if the district would allow minority voters to elect their candidate of choice more than 50% of the time in an exogenous election index. Section 2 does not require that minority-preferred candidates would win some number of exogenous statewide elections in a proposed district. Such a requirement is not compatible with the Supreme Court's directives that § 2 requires a

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Court does not adopt such a rule and instead supports a particularized inquiry into the facts of each case to determine whether a particular district provides a reasonable opportunity. *See, e.g., Cottier v. City of Martin*, 604 F.3d 553, 571 (8th Cir. 2010) (Smith, J., dissenting).

[15] *Uno v. City of Holyoke*, 72 F.3d 973, 979 (1st Cir. 1995) ("the statutory scheme does not provide an assurance of success at the polls for minority candidates"); *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 449 (S.D.N.Y. 2010) ("This does not mean that Port Chester is obligated to guarantee electoral success for Hispanics, but rather the plan must provide a genuine opportunity 'to exercise an electoral power that is commensurate with its population.'") (citing *LULAC*, 548 U.S. at 428); *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 763 (N.D. Ohio 2009) ("[T]here is no right under the Voting Rights Act to win; there is, rather, a right to meaningfully compete.").

searching, practical inquiry specific to the facts of each case.[16]

Performance of 50% or lower on a statewide exogenous election index does not automatically rule out minority opportunity. Based on the evidence, we know that CD23 may still perform relatively well for minority-preferred candidates even when its performance on statewide indices is equal to or less than 50%.[17] The OAG 10 indicated that benchmark CD23 performed for minority candidates in only 3 of 10 statewide elections, and Dr. Handley's 2011 and 2014 analyses indicated a 40% and 50% minority success rate. TrA617 (Handley). The Task Force indices revealed a 7/14 (50%) and a 3/7 (43%) success rate.[18] Nevertheless, despite the 50% or less success rate in those exogenous election indices, preferred-minority candidate success in the actual endogenous elections of the district demonstrates that benchmark CD23 did in fact provide "real electoral opportunity." *See* TrA592-93, TrA617-18 (Handley) (the endogenous election is most important to consider because it shows whether a district is actually performing for minorities, and she would not rely on the exogenous

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[16] *Gingles*, 478 U.S. at 79 (explaining that the proper assessment of vote dilution claims is "peculiarly dependent upon the facts of each case").

[17] In fact, this knowledge forms part of the basis for Dr. Alford's opinion that proposed CD23 would still perform in endogenous elections despite its poor performance on the exogenous election indices. Dr. Alford's opinion is discussed below.

[18] As these numbers demonstrate, a standard that relies on a certain percentage of wins in an exogenous election index is further undesirable because different indices reflect different success rates depending on the set of elections selected.

election index in an existing district); *see also* Engstrom Corr. Rebuttal Report (docket no. 307-1) at 26-27; Tr512-15 (Engstrom) (to determine whether a district is an opportunity district, he would look to endogenous elections if there were any, and benchmark CD23's endogenous performance demonstrates that it was a Latino opportunity district despite its lack of performance in 2010). Of course a proposed district such as CD23 in Plan C185 will not have endogenous election indices to guide the determination, and performance on an exogenous election index (or various indices, preferably) will be important evidence in determining whether a district provides real opportunity to elect. The Court simply declines to adopt any bright-line rule that sets a specific success percentage on such indices for defining opportunity.

With these principles in mind, the Court turns to an examination of whether proposed CD23 provides "real electoral opportunity." The Court begins with the Supreme Court's decision in *LULAC v. Perry*, 548 U.S. 399 (2006), which concerned CD23 after the 2003 redistricting. In 2003, the Legislature, trying to protect Republican incumbent Henry Bonilla, reduced the HCVAP of CD23 from 57.5% to 46% and "the projected results in new District 23 show[ed] that the Anglo citizen voting-age majority [would] often, if not always, prevent Latinos from electing the candidate of their choice in the district." *Id.* at 427. Although the benchmark district "had not been an effective opportunity district," the district court found it was "moving in that direction," and the Latino candidate of choice won 13 of 15 statewide elections in the district in 2002. *Id.* at 428. The fact that Latinos had not yet won elections in CD23 itself did not

resolve the issue of vote dilution, because the Latino majority was becoming more active and was increasingly voting against Bonilla, such that CD23's "Latino voters were poised to elect their candidate of choice." *Id.* at 438. Thus, the Court found that Latino voters had a real opportunity to elect that was taken from them by the redistricting. *Id.* at 428-29.

On remand, the U.S. District Court for the Eastern District of Texas redrew CD23 to be an "effective Latino opportunity district" based on its HCVAP numbers (57.4%) and its election performance. *LULAC v. Perry*, 457 F. Supp. 2d 716, 721 (E.D. Tex. 2006) ("In addition to the HCVAP numbers, the underlying data from the statewide elections supports the conclusion that new District 23 will perform as an effective Latino opportunity district."). Even when drawn to be "effective" and with a 57.4% HCVAP, however, CD23 did not consistently perform for minority candidates of choice, and the elections were close. CD23 elected the minority-preferred candidate in the first two of three endogenous elections, with the loss in which Canseco was elected occurring during the Republican/Tea Party sweep in 2010. According to Dr. Engstrom, the 2010 election was highly racially polarized, and Latino turnout was low. Engstrom Corr. Rebuttal Report (docket no. 307-1) at 25-26; Tr509 (Latino support for Rodriguez was 84.7% while non-Latino support was only 18.1%) (Latinos were 40.77% of actual voters turning out); Tr514 (turnout was low compared to registration percentages); *see also* Tr1865 (Alford) (agreeing with Engstrom's turnout data).

In 2011, Republican leaders in the House and Senate were concerned that Canseco would lose the 2012 election unless the district was changed to protect him. TrA224-25

(Seliger) (agreeing that he thought it was possible that Canseco would lose in 2012 if the district were not reconfigured). Mapdrawer Ryan Downton knew that Canseco was not the Latino candidate of choice. Tr966 (Downton) ("I was told that he was not."); Downton 8-12-11 depo. (Joint Ex. J-62) at 90 ("I don't believe he was."). As it did in 2003, the Legislature therefore reconfigured the district to protect a Republican candidate who was not the Latino candidate of choice from the Latino voting majority in the district. And as it did in 2003, the Legislature intentionally split a largely Hispanic county (Maverick County, which is 95.7% Hispanic) and city (Eagle Pass) to exclude from CD23 politically active Hispanics who would not support Canseco, while adding in all or parts of more Anglo counties. TrA1666 (Downton) (admitting that some Maverick County Hispanics were excluded from CD23 because they would not support Canseco); Downton 8-12-11 depo. (Joint Ex. J-62) at 87 (portions of Maverick County were excluded because "Maverick County does not have a particularly good record of voting in high numbers for Republicans"). However, this time Downton and the Republican leadership took care to maintain SSVR and HCVAP levels above 50% (and in fact above benchmark), thus maintaining theoretical opportunity, while simultaneously manipulating the population of the district to decrease its potential effectiveness for Latinos. This was not an easy task, given that the Senate-side mapdrawers had been unable to maintain CD23 as an opportunity district and still protect Canseco, TrA222-24 (Seliger), and it did not happen by accident. TrA524 (Flores) (the changes are systematic and precise, not accidental).

In addition to the Maverick County split to exclude politically active Hispanics who would not support Canseco, mapdrawers (specifically Downton) took steps to increase the turnout gap between Latinos and Anglos and to decrease Latino cohesion in the district. Although Downton did not propose the "nudge factor" idea, Downton understood that manipulating Latino cohesion and turnout would affect a district's performance for minority voters. Downton 8-31-11 depo. (Joint Ex. J-62) at 26-27. Downton admitted to increasing the district's SSVR while simultaneously intentionally manipulating (decreasing) Hispanic voter cohesion in the district by including Republican Hispanics and excluding non-Republican (Democrat) Hispanics. He stated that he did this by looking for precincts with high SSVR and including those with high voting percentages for Republicans and excluding those with lower voting percentages for Republicans.[19] The intentional use of race to maintain or increase the HCVAP and SSVR levels was not done to provide or protect Latino voter opportunity

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[19] Of course, as Downton acknowledged, precincts with both high SSVR and high voting percentages for Republicans would not necessarily include only precincts with higher numbers of Hispanic Republican voters. They could also reflect precincts with low Hispanic turnout and high Anglo Republican turnout or higher Anglo bloc voting levels. Further, although Downton claimed this manipulation to allegedly include Hispanic Republicans was to help Republican Hispanic incumbent Canseco, he did not consult with Canseco about whether the changes would benefit him in the Republican primary, and Downton made changes that did not favor Canseco in this regard. The Court finds that Downton's changes were not made to aid Canseco as a Hispanic Republican, but to make the district less effective for Hispanics, whom Downton viewed as synonymous with Democrats.

but rather "to create the facade of a Latino district." *See LULAC*, 548 U.S. at 441 (noting that the use of race to create the facade of a Latino district weighed in favor of a § 2 claim); TrA525 (Flores).

Although Downton denied intentionally manipulating turnout, the Court does not find this denial to be credible. More than 600,000 individuals were moved around to achieve the final configuration of CD23, and 39 voter tabulation districts ("VTDs") were split. PL-1633. Downton split two precincts in Maverick County, nineteen precincts in Bexar County, nine precincts in El Paso County, one precinct in La Salle County, and eight precincts in Atascosa County, and he did not provide any convincing explanations for the splits, indicating that race was being used as the basis for allocating population into and out of CD23.[20] He moved in lower-turnout Hispanics and moved out higher-turnout Hispanics in some areas. In other areas, he moved in Hispanics but simultaneously moved in Anglos with comparatively higher turnout rates. The net effect across the district was to widen the participation gap by 4.1% (decreasing SSVR turnout and increasing non-SSVR turnout). TrA519-20, TrA523-24 (Flores) (noting that non-Latinos in the district turn out at almost a two-to-one rate compared to Latinos).[21]

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[20] *See Bush v. Vera*, 517 U.S. 952, 970-71 (1996) (given that RedAppl provides only racial data at the block level, the fact that a district splits VTDs and individual streets in many places suggests that racial criteria predominated over other criteria in determining the district boundaries).

[21] Defendants argue that changes in Bexar County were made to create new CD35 and maintain HCVAP levels in CD20, but Downton's explanations of why certain areas in Bexar County were included and excluded were not credible and were not supported by

Plaintiffs established by a preponderance of the evidence that turnout was manipulated in addition to cohesion, and the increases in SSVR and HCVAP were not intended to and did not maintain or improve Latino voting strength. TrA518-19 (Flores).[22] Instead, Downton used race to increase the SSVR and HCVAP of CD23 to

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the evidence. Further, Dr. Alford's conclusions regarding Bexar County are consistent with Plaintiffs' experts and do not undermine Dr. Flores's conclusions that the *overall* effect of areas moved in and out of CD23 was to decrease SSVR turnout, increase non-SSVR turnout, and widen the turnout gap. In addition, the fact that the turnout analysis was based on 2010 turnout (a non-presidential year) and there may be lower minority turnout in such years than in presidential years (such as 2008) does not undermine the conclusion that the turnout gap was intentionally widened. Flores compared turnout rates in the benchmark district and the proposed district *in the same election year* (2010), and found the turnout gap was significantly increased between the benchmark and the enacted plan. We can only speculate about what the turnout results may have shown in a different year; such speculation does not undermine Dr. Flores's results.

[22] The fact that the specific datasets originally requested by Opiela were not available in RedAppl does not undermine the conclusion that turnout was manipulated. The evidence, including the testimony of Clare Dyer and the expert testimony, establishes that turnout could be manipulated based on data available in RedAppl. In addition, the evidence indicates that the OAG produced reports showing estimated turnout by race for VTDs in the various districts, including CD23 (*see* US-600, Quesada-271); TrA1740 (Downton) (discussing the fact that US-601, a racially polarized voting analysis produced by the OAG, included estimated turnout percentage for Hispanic voters in CD23 in various elections). Further, as Downton made changes to the district he could and did evaluate their impact on the district's performance for Latino candidates of choice. Thus, any argument that Defendants lacked the necessary data to manipulate turnout is refuted by the evidence.

create the facade of a Latino opportunity district, while he intentionally manipulated Hispanic voter cohesion and turnout to reduce the performance of the district for Hispanic candidates of choice. Downton knew and intended that the changes would decrease performance for Latino-preferred candidates in the district, and he knew from the OAG 10 that he had achieved this intended goal.

Further, Solomons' statements on the House floor (which were likely prepared by Downton) actively misled other legislators about why changes were made and about the district's performance. He stated that mapdrawers maintained the performing nature of all the Hispanic-majority districts and that increases to SSVR in CD23 were necessary to "maintain the performing nature" of CD23 in particular. D-603.2 at S367. The evidence indicates that mapdrawers did not maintain the performing nature of the district, that it in fact performed worse, and that mapdrawers were not only aware of this fact but intended it. Yet they claimed their use of race was to help Latino performance in order to maintain the facade of a Latino opportunity district.

Thus, to protect an incumbent who was not the choice of the Latino majority in the district and who they knew would likely be ousted in the next election by those Latino voters, mapdrawers intended to decrease and successfully decreased the performance of CD23 for minority-preferred candidates. There was both discriminatory motive and improper use of race to achieve the desired goal.[23] While § 2 does not require relief merely due to

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[23] While incumbency protection may be a legitimate goal standing alone in certain circumstances, "winning an election does not

lower Latino voter turnout, intentionally targeting Hispanic voter turnout and cohesion while advantaging Anglo cohesion and turnout is qualitatively different.[24] And when done to minimize Hispanic electoral opportunity, it bears the mark of intentional discrimination.

The Court also finds that the reconfiguration of CD23 had the intended effect insofar as it decreased minority performance. This decrease in performance is undisputed, but the parties do dispute whether CD23 still provided an opportunity for minority voters to elect. As noted above, although a district may provide theoretical opportunity given its majority-HCVAP status, whether a proposed district provides "real electoral opportunity" must be determined through an examination of the

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empower anyone in any party to engage in purposeful racial discrimination." *N. Ca. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 226 (4th Cir. 2016). As Judge Costa recently noted, discriminatory purpose can be the product of "elected officials engag[ing] in the single-minded pursuit of incumbency." *Veasey v. Abbott*, 830 F.3d 216, 335-36 (5th Cir. 2016) (Costa, J., dissenting in part) (citing *Garza v. Cty. of L.A.*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring); *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984) ("[M]any devices employed to preserve incumbencies are necessarily racially discriminatory."); *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 313 (D. Mass. 2004) (noting that incumbency protection in its traditional form is often thought to be a legitimate consideration in redistricting; "[t]he issue becomes more complex, however, when race is used as a tool to achieve incumbency protection").

[24] This is even more true given the well-documented history of discrimination against Hispanics in Texas and its lingering effects on their electoral participation, which is discussed later.

totality of the circumstances, including its performance on exogenous election indices.

All of the Plaintiffs' experts opined that CD23 in Plan C185 does not provide electoral opportunity. Dr. Flores concluded that proposed CD23 was not an opportunity district and that a Hispanic candidate would find it very difficult to get elected. Tr454-55. Dr. Arrington also testified that the exogenous election index indicates that CD23 offers no opportunity for Hispanics to elect a candidate of their choice. TrA405. Dr. Engstrom concluded that CD23 was not a Latino opportunity district. Tr515-16. Dr. Lichtman stated that CD23 does not provide a reasonable opportunity to elect minority candidates of choice. Tr1235-36 (also noting that the candidate of choice of Latino voters lost five general elections in 2008 and 2010, and in some cases by wide margins); Joint Expert Ex. E-3 at 15-17, Table 8. Dr. Handley performed a functional election-based analysis of CD23, using its demographics as a starting point, and then considering election performance, racial bloc voting analyses, crossover, cohesion, and participation rates, and concluded that CD23 in Plan C185 would not have given minority voters an opportunity to elect candidates of choice. TrA590-92 (Handley). Her 2014 exogenous election index using six statewide, top-of-the-ticket elections from 2002 to 2012 that included a minority-preferred minority candidate showed 0/6 wins for the minority-preferred candidates. TrA596 (Handley).

Even Dr. Alford stated that he would not count CD23 as "effective" or "performing" for Latinos (though of course that is not the measure of opportunity). Tr1839, Tr1878; Alford depo. (Joint Ex. J-43) at 139; D-430 (also finding 0/6 wins for Democrats in his reconstituted

exogenous election analysis). In his 2014 testimony, however, Dr. Alford opined that CD23 is capable of electing a Democrat (which he equates with Latino candidate of choice) even though it "tilts Republican" in the exogenous election index, and he performed a "reconstituted mosaic" analysis to determine whether this might be true in Plan C185. He concluded that in Plan C100 and Plan C235, there is the potential for the CD23 endogenous election to be more favorable to minority candidates than the exogenous pattern would suggest, and his analysis suggested that it was at least possible that the same would be true for the Plan C185 configuration. TrA1857 (Alford). However, the Court finds that Alford's unique methodology and conclusions are too speculative to be afforded much weight, and his conclusions are outweighed by the numerous expert opinions offered by Plaintiffs that CD23 as configured in Plan C185 does not provide real electoral opportunity.

In addition to the expert analyses and exogenous election indices indicating that CD23 as enacted in Plan C185 does not provide real electoral opportunity, all of the experts agreed that there is racially polarized voting in Texas, and the State conceded this point with regard to all areas included in CD23. As noted, Dr. Engstrom found significant racially polarized voting in the 2010 general election for CD23. Engstrom Corr. Rebuttal Report (docket no. 307-1) at 25; Tr509 (incumbent Rodriguez received an estimated 84.7% of the votes cast by Latinos and just 18.1% of those cast by non-Latinos).

The Court further considers the mapdrawers' fracturing of Maverick County and politically active communities in South San Antonio. Disruption of politically active and cohesive Latino voting areas has the

foreseeable effect of depressing Latino turnout, magnifying the increase in the turnout gap identified by Dr. Flores. *See LULAC*, 548 U.S. at 440 (noting that the State acted against those Latinos who were becoming most politically active, dividing them with a district line through the middle of Laredo).

Plaintiffs also provided evidence concerning the lingering effects of past discrimination on Latino voter turnout and electoral opportunity. Several courts have recognized the "long history of discrimination against Latinos" in Texas and its role in the electoral process. *LULAC*, 548 U.S. at439-40 (citing cases); *LULAC v. Clements*, 999 F.2d 831, 866 (5th Cir. 1993) ("Texas' long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute among the parties. Nor has anyone questioned plaintiffs' assertion that disparities between white and minority residents in several socioeconomic categories are the tragic legacies of the State's discriminatory practices."). The Supreme Court has further recognized that "the 'political, social, and economic legacy of past discrimination' for Latinos in Texas may well 'hinder their ability to participate effectively in the political process.'" *LULAC*, 548 U.S. at 440 (citations omitted).

Dr. Andres Tijerina's expert report was admitted without objection. Joint Expert Ex. E-10. He opined on the history of the violation of civil rights of Latinos in Texas and the use of devices related to voting to limit the Mexican-American vote. *Id.*; Tr592-96 (discussing use of the white man's primary, the poll tax, the literacy clause, intimidation, corralling, slating). He testified that those devices "left a legacy that hinders and has prevented Mexican-Americans from feeling comfortable and feeling

any trust in the electoral system." Tr595. He states that "[t]he legacy of 150 years of multi-faceted government-condoned discrimination against Mexican Americans in Texas is a state educational system that maintains a high drop out rate and is still characterized by widespread segregation." Joint Expert Ex. E-10 at 30. He further concludes that, "[a]s a result of the historical discrimination against Mexican Americans in Texas, they still bear the effects of this discrimination which hinders their ability to participate effectively in the political process" and "[i]t is clear that the lower rates of voter registration, voting, and running for elective office are directly related to this discrimination." *Id.* at 32; Tr596 (Tijerina) (legacies of past discrimination affect voter registration, voter turnout, campaign organization, running for office, and voting itself).

Dr. Susan Gonzalez-Baker's report was admitted without objection. Joint Expert Ex. E-9. She concluded that it is clear "that Latino educational achievement lags far behind that of Non-Latino Whites in the same age bracket." *Id.* at 7. Further, "absolute median incomes are substantially lower for both [Latino] men and women than they are for Non-Latino Whites." *Id.* At 9. Dr. Baker noted that the ACS data "speak to a continuing pattern of disadvantage with respect to social and economic well-being, one that is likely to persist for some time into the future." *Id.* "[O]n indicators spanning a range of topics from educational attainment to childhood poverty, to female-household-headship poverty, to income, to unemployment, Latinos display a continuing legacy of disadvantage relative to their Non-Latino counterparts." *Id.* at 10.

Dr. Jorge Chapa's report was admitted without objection. Joint Expert Ex. E-1. Dr. Chapa surveyed certain counties with large Hispanic populations and established that Texas Hispanics have lower levels of both education and income and higher poverty rates when compared to non-Hispanics, and these disparities have persisted throughout the 20th Century. *Id.* at 4-5. Dr. Chapa noted that the lingering effects of past discrimination such as lower economic and educational attainment are strongly associated with lower rates of registration, voting, and participation in the political system. *Id.* at 5 ("[D]iscrimination still has a strong present day impact on the education, income and earning of Hispanic Texans."); *id.* at 16 (noting effect on voter registration and turnout); Tr179-80, Tr203 (lower economic and educational attainment are strongly associated with lower rates of registration, voting, and participation in the political system); Tr189 (there are lower levels of income, education, and earnings that continue to the present day and they have the lingering effect of lowering the Latino participation rates in vote and registration and politics in general); Tr200 (there are a plethora of studies that show that people with lower levels of education and lower incomes participate less in our electoral system); Tr201 (there are lower registration rates and lower participation rates among registered voters).

Dr. Lichtman analyzed turnout rates (as a percentage of voting age population) for Hispanics, African-Americans, and Anglos in five elections (2008 President, 2008 US Senate, 2008 Supreme Court Chief Justice, 2010 Governor, and 2010 Lt. Governor) and found a statewide mean turnout rate of 14%, 39%, and 52%, respectively.

Joint Expert Ex. E-3 at 10, Table 3. The Fifth Circuit also recently noted in the voter ID case that "the record contains evidence that minority voters generally turn out in lower numbers than non-minority voters and that State-sponsored discrimination created socioeconomic disparities, which hinder minority voters' general participation in the political process." *Veasey v. Abbott*, 830 F.3d 216, 261 (5th Cir. 2016). It is undisputed that Latino voter turnout in CD23 in 2010 was low. Tr509, Tr514 (Engstrom); Engstrom Corr. Rebuttal Report (docket no. 307-1) at 25-26; Tr1865 (Alford).

Considering all the evidence, including the mapdrawers' intent to protect an incumbent who was not the Latino candidate of choice and to lower the Latino performance of CD23, the expert testimony, the high level of racial polarization, the low Latino voter turnout, the manipulation of voter turnout and cohesion, the increase in the turnout gap, the splitting of cohesive, politically active areas (Maverick County, San Antonio), and the lingering effects of past discrimination on turnout and electoral participation, the Court finds that CD23 does not provide real electoral opportunity.

In sum, the VRA does not require that minority opportunity districts be drawn to give minorities a sure chance or even the best chance at electing their candidates of choice. Minorities are not immune from the obligation to "pull, haul, and trade to find common political ground." *De Grandy*, 512 U.S. at 1020. Section 2 does not require those who draw election districts to draw majority-minority districts with the most potential or to maximize minority voting strength, nor does it always require mapdrawers to account for low voter turnout. However, it does require equality of opportunity, and that

equality is lacking where the mapdrawers take steps to intentionally disadvantage Hispanic voters in the district, even if done to further political goals. Including lower-turnout Hispanics and excluding higher-turnout Hispanics (and fracturing politically cohesive and active Hispanic communities), while simultaneously including higher-turnout Anglos in the district ensures that Hispanics have less practical opportunity to elect. Although the State contends that it has no obligation to account for low Hispanic voter turnout, it certainly has an obligation to avoid treating Hispanic voters less favorably than Anglo voters in determining the population of the district. Similarly, mapdrawers cannot intentionally target Hispanics by including less cohesive Hispanic precincts and those with higher Anglo cohesion in an attempt to depress Hispanic opportunity to elect. Because mapdrawers had the intent to provide Hispanic voters less opportunity to participate in the political process and elect their candidates of choice, and they effectuated that intent in CD23, CD23 violates § 2 in both intent and in effect.

2. CD23 Shaw*-type racial gerrymandering claims*

The Task Force Plaintiffs also mount a *Shaw*-type racial gerrymandering claim against CD23. *See* docket no. 416 at 36; docket no. 1313; docket no. 1308; Fourth Am. Complaint (docket no. 891) ¶ 56. Defendants do not contest standing on this claim. See docket no. 1310. Plaintiffs Gilberto Torres and Socorro Ramos live and vote in CD23 in Plan C185, and thus they have standing to assert this claim. Docket no. 277 at 17 (stipulated); *Shaw*

v. Hunt, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996).25[25]

The Supreme Court recently reaffirmed that a *Shaw*-type racial gerrymandering claim is "that race was improperly used in the drawing of the boundaries of one or more specific electoral districts." *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015). The plaintiff's evidentiary burden is "to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 1267. In *Alabama Legislative Black Caucus* ("*Alabama LBC*"), the Court recognized such a claim in plaintiffs' evidence "that the legislature had deliberately moved black voters into [certain] majority-minority districts . . . in order to

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[25] MALC also asserts that it has mounted *Shaw*-type claims against CD23. *See* docket no. 1309 at 7. MALC member Pete Gallego resides in proposed CD23 in Plan C185, which would provide standing to assert such a claim. Docket no. 258-3. However, Defendants contend that MALC has not in fact raised a *Shaw*-type claim, but instead has raised only an intentional discrimination claim under the Equal Protection Clause. Defendants argue that although MALC uses the term "racial gerrymandering," it has done so only in the context of vote-dilution claims and has not pleaded or pursued an independent claim of racial gerrymandering under *Shaw*. The Quesada Plaintiffs also provided briefing concerning how the evidence establishes a *Shaw* claim in CD23. *See* docket no. 1305. The Court need not decide at this time whether these or other Plaintiffs have asserted such a claim.

prevent the percentage of minority voters in each district from declining." *Id.* at 1266-67.[26]

In this case, there is clear evidence that Downton moved certain populations of Hispanics into CD23 to increase its SSVR and HCVAP numbers. In doing so, traditional redistricting principles such as respecting city and county boundaries were subordinated to this racial goal when Downton placed half of Maverick County into CD23 solely to maintain Hispanic numbers, splitting both Maverick County and the City of Eagle Pass. Downton 8-12-11 depo. (Joint Ex. J-62) at 35 (stating that half of Maverick County was placed into CD23 to make sure they were not reducing Hispanic population percentages); *id.* at 86 ("And so 23 in order to stay at benchmark level needed to be more Hispanic in other areas. I think that's why Maverick County is included."); *id.* at 88 (Maverick County population was included solely to maintain Hispanic numbers "to comply with the Voting Rights Act" and not for political reasons); TrA1642 ("we had to maintain the existing majority Hispanic status" of CD23); TrA1754-56 (Downton) (he was not paying attention to the

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[26] Even more recently, the Supreme Court reaffirmed the principles it set forth in *Alabama LBC*, the *Shaw* line of cases, and *Miller v. Johnson*. *Bethune-Hill v. Va. State Bd. of Elections*, __ S. Ct. __, __ (2017) ("The Court reaffirms the basic racial predominance analysis explained in *Miller* and *Shaw II*, and the basic narrow tailoring analysis explained in *Alabama*."). *Bethune-Hill* additionally made clear, however, that "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering" and that courts should evaluate the predominant motive for the design of the district as a whole. *Bethune-Hill*, __ S. Ct. at __.

City of Eagle Pass boundaries when adding in Hispanic portions of Maverick County even though the City is a community of interest). Downton and Interiano stated that maintaining or increasing Hispanic percentages needed to be done to comply with the VRA. Downton 8-12-11 depo. (Joint Ex. J-62) at 88, 73-74 (stating that they tried to comply with the VRA "to make sure that [CD23] wasn't subject to court challenge" by maintaining or increasing all Hispanic population percentages, including total population, HVAP, SSVR, and HCVAP). Downton also stated that he deliberately looked for and included certain precincts with high SSVR. The Court finds that race was the predominant motive in the decision to include significant numbers of Latino voters into CD23, triggering strict scrutiny.

To survive strict scrutiny, the challenged districting plan must be narrowly tailored to serve a compelling governmental interest. *Bush*, 517 U.S. at 976. Downton indicated that he was trying to increase HCVAP enough to be safe from a VRA challenge even though the district's minority electoral performance remained low.[27] US-630 (May 28 email). Downton testified that he was the one who "made the call" regarding inclusion of part of Maverick County. TrA1668. However, increasing Hispanic numbers

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[27] Doug Davis, the Director of the Senate Redistricting Committee, also testified that he believed CD23 complied with the VRA because they increased the relevant population metrics (Hispanic population, HVAP, HCVAP, and SSVR), though he did not know whether these changes increased Latino ability to elect. Davis depo. (Joint Ex. J-58) at 52-53. He also indicated that VRA compliance was measured primarily by meeting or exceeding benchmark population numbers, and that election performance in terms of ability of elect was an issue left to counsel. *Id.* at 23-25.

simply to avoid a VRA challenge and without attempting to ensure or maintain opportunity to elect (to comply with § 2) or ability to elect (to comply with § 5) (and in fact working to decrease such opportunity and/or ability) cannot survive strict scrutiny because such use of race was not to comply with the VRA. *See Alabama LBC*, 135 S. Ct. at 1274-75 (use of race to preserve minority percentages without preserving minority ability to elect would not be narrowly tailored to comply with § 5); *Bush v. Vera*, 517 U.S. 952, 959, 976 (1996) (explaining that to survive strict scrutiny, the district must be narrowly tailored to further a compelling governmental interest). The Court thus finds that Plaintiffs have established a *Shaw*-type equal protection violation in the drawing of CD23 because the use of race predominated in the decision to include substantial population within and without the district, subordinating traditional redistricting principles, and the use of race was not narrowly tailored to comply with a compelling state interest.[28]

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[28] *Alabama LBC* indicates that *Easley v. Cromartie*, 28 532 U.S. 234, 258 (2001) sets forth the plaintiff's burden in cases in which the plaintiff asserts a Shaw-type claim against a majority-minority district where racial identification correlates highly with political affiliation and the State argues that politics, not race, was its predominant motive. *Alabama LBC*, 135 S. Ct. at 1267. In that case, the issue was whether individuals were included in a district because they were African American or because they were Democrats—in other words, "whether the legislature drew District 12's boundaries because of race *rather than* because of political behavior (coupled with traditional, nonracial districting considerations)." *Easley*, 532 U.S. at 257 (emphasis in original). That is not the question presented here with regard to CD23. Rather, Defendants admit (and the evidence demonstrates) that a portion of the population of CD23 (half

3. CD35 Shaw*-type racial gerrymandering claim*

Although Defendants contend that the Rodriguez Plaintiffs have not asserted any *Shaw*-type claims, *see* docket no. 1310 at 4-5, these Plaintiffs have plainly asserted such a claim related to CD35 throughout this litigation as part of their Fourteenth Amendment equal protection claim.[29] The Court recognized this in its March

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of Maverick County) was included because they were Hispanic and for no other reason. In addition, according to Downton, certain precincts were included because they were Hispanic *and* Republican. The fact that, among those Hispanics being considered for inclusion, Downton purportedly tried to choose more Republicans than Democrats, as Downton stated that he did (or, as the Court has concluded, lower turnout Hispanics) does not negate the fact that individuals were first selected for inclusion because of their race. Race, not politics, was the predominant inclusion criterion. And, as discussed, the use of race was not to comply with the VRA and thus did not further a compelling state interest.

[29] *See, e.g.*, docket no. 229 at 10 ("Plaintiffs prevail if they 'show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."(citing *Miller v. Johnson*, 515 U.S. 900, 916 (1995)); docket no. 603 at 7 ("CD 35 is also inconsistent with the equal protection requirements in cases such as *Shaw v. Reno* and, more recently, *Bartlett v. Strickland.*"); docket no. 623 at 68-69 ("For related reasons, C185's CD 35 is constitutionally flawed under the *Shaw v. Reno* line of cases, barring racebased redistricting based on convoluted lines and bizarre shapes. CD 35, in fact, strongly resembles the prototypical North Carolina district, CD 12, that gave birth to the *Shaw v. Reno* doctrine."); docket no. 896 (Second Am. Compl.) at 11 (noting that Plan C185 uses race as a tool to divide Travis County and Austin and "[i]n so carving up the residents of Travis County and Austin, the legislature disregarded traditional and neutral redistricting principles"). Their live Complaint asserts that

19, 2012 order, in which it noted that "[c]ertain Plaintiffs, but primarily the Rodriguez Plaintiffs, contend that CD 35 is an impermissible racial gerrymander." Docket no. 691 at 41-42. The Court concluded that, "[w]hether CD 35 crosses the line from a permissible § 2 district to an impermissible racial gerrymander is a close call" and then analyzed the district under the *Shaw* line of cases. *Id.* at 42-49.

The Rodriguez Plaintiffs contend that the new CD35 was drawn predominantly on the basis of race but is not a reasonably compact district and does not comply with § 2. *See* docket no. 424 at 26; docket no. 1277 at 40-41. In support, they note that Defendants' expert Todd Giberson ranked it as the least compact district in Plan C185 by each of the three technical compactness measures,[30] that Dr. Alford also stated it was not a compact district, and that Downton stated it was "borderline" and that he had his doubts that the district was required by § 2. Docket no. 1277 at 40-41; Joint Expert Ex. E-18 (Giberson

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Plan C185 violates the Equal Protection Clause by purposefully fragmenting Hispanics and African-Americans in all regions of the state, dispersing them among numerous districts without regard to traditional and neutral redistricting principles; that the Legislature carved up the residents of Travis County and Austin by using race and disregarded traditional and neutral redistricting principles; and that Plan C185 uses race as a tool for no compelling reason to destroy CD25 in Travis County. Docket no. 896 at ¶ 18. The fact that Plaintiffs specify an improper purpose does not mean that they are not asserting a *Shaw*-type claim. While an intentional vote dilution and a *Shaw* claim are analytically distinct, meaning the Court must analyze them under different rubrics, they are not mutually exclusive, and the allegations are sufficient to support both types of claims.

[30] Giberson also found that CD35 was not "compelling from a Section 2 standpoint." Giberson depo. (Joint Ex. J-42) at 100-01.

report); Alford depo (Joint Ex. J-43) at 42-44 (noting that CD35 caught his eye and was "definitely not a compact district"); Tr987-88 (Downton). The Rodriguez Plaintiffs further argue that CD35 is "tenuous . . . in terms of the way it links different communities of interest, as well as the way it disregards traditional districting criteria." Docket no. 424 at 28; docket no. 1277 at 42. They note that in Travis County, mapdrawers "went to extreme lengths to gather in Hispanic population" and that minority communities in San Antonio and Austin were linked in a questionable manner into the non-compact new CD35. Docket no. 424 at 28-29; docket no. 1277 at 43. Their claim therefore addresses the elements of a *Shaw*-type racial gerrymandering claim—that race was improperly used in the drawing of the district boundaries, that race was the predominant factor motivating the decision to place a significant number of voters within the district (such that traditional districting criteria were disregarded or subordinated to racial criteria), and that such use of race was impermissible (would not survive strict scrutiny) because the district is not compelled by or drawn in compliance with the requirements of § 2 of the VRA.

Although the Rodriguez Plaintiffs assert an interrelated claim under *Bartlett v. Strickland* that Defendants intentionally destroyed a viable crossover district in Travis County (benchmark CD25) and an intentional vote dilution claim, that does not mean they are only asserting an intentional discrimination claim. As they noted in their Advisory in response to the Court's request for briefing after the *Alabama LBC* decision, "Crossover CD25's dismantlement contains elements of both intentional minority vote dilution and a racial gerrymander. The intentional vote dilution suffices to

invalidate it, but the predominance of race in the way it was accomplished also would invalidate it, in light of *Alabama LBC*, as a racial gerrymander." Docket no. 1302 at 3 n.1. Thus, the Rodriguez Plaintiffs have stated a *Shaw*-type claim against CD35, and Plaintiffs Eddie Rodriguez and Betty Lopez have standing to assert this claim because they live in CD35 in Plan C185. Docket no. 277 at 17 (stipulated).[31]

In its interim map order concerning the CD35 *Shaw*-type claim, this Court concluded that this was a "mixed motive" case as described by a plurality of the Court in *Bush v. Vera*, 517 U.S. 952, 959 (1996), and noted that in such cases "determining when traditional districting criteria have become subordinated to race is highly fact specific and difficult." Docket no. 691 at 44. The Court did not find Plaintiffs likely to prevail on this claim because Plaintiffs had "not convinced the Court at [that] stage that district lines in CD 35 were manipulated to such an extreme degree" that race predominated. Docket no. 691 at 46. The Court now finds that its preliminary finding—made without the benefit of a full examination of the evidence—was in error. A careful review of the evidence shows that CD35 was drawn in such a manner that race predominated. Further, the Court finds that CD35 does not survive strict scrutiny.

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[31] Although Defendants have argued 31 that Plaintiff Eddie Rodriguez was not harmed because he remained in a Latino opportunity district, *see, e.g.*, TrA851-52 and docket no. 1272 at 126, that argument misunderstands the harm that confers standing to assert a *Shaw*-type racial gerrymandering claim. The harm flows from being "personally . . . subjected to [a] racial classification," not from vote dilution or intentional discrimination. *Alabama LBC*, 135 S. Ct. at 1265.

The Court's fact findings based on the entire record provide ample support for the conclusion that race was the predominant factor motivating the decision to place a significant number of voters within or without CD35. It is undisputed that the Legislature, and its mapdrawer Ryan Downton, intended to create CD35 as a new Latino opportunity district, meaning it had to have over 50% HCVAP. Tr915-16 (Downton) (stating that he was "directed to" create "a new citizen voting age population majority district for Hispanics in Texas"); Tr918 (Downton) ("When we drew the map originally, we were focused on getting District 35 above 50 percent of HCVAP."); TrA1642 (Downton) ("When we were creating District 35, we were creating a Section 2 majority Hispanic CVAP district, so it had to be over 50 percent."). That criteria (a majority HCVAP) was the number one criteria for drawing the district, and could not be compromised for any other purpose or traditional districting criteria. Downton 8-12-11 depo. (Joint Ex. J-62) at 86 ("We had to keep or we wanted to keep 35 above 50 percent.").

Defendants admit that Downton set out to draw a majority-HCVAP district when he drew CD35 and that he considered racial data to reach the 50% threshold. Docket 1272 at 126. However, Defendants argue that non-racial factors, including placing the district where the population growth occurred and partisan politics (including targeting Congressman Lloyd Doggett), as well as other considerations such as requests from Texas House Representatives to keep Guadalupe County whole or to weight the district more heavily toward Bexar County played a role in shaping the district. The Court finds that while other factors did play some role in shaping

the district, racial criteria had a qualitatively greater influence on the drawing of district lines and selection of district population, such that race predominated over other districting criteria and those other criteria were subordinated to race.[32]

Previously, the Court found significant that although Downton admitted to trying to include Hispanics in the Travis County portion of CD35, Downton had not maximized the Hispanic population in CD35 because some Travis County Hispanics were left outside CD35. *See* docket no. 691 at 46-47. Because of this, the Court noted that "Plaintiffs' assertion that the Legislature 'went to extreme lengths to gather in Hispanic population' [was] not fully supported by the evidence." Docket no. 691 at 47. Upon a full review of the record, the evidence has shown that Downton was trying to weight the district more toward Bexar County at the request of certain Representatives, and thus he did not maximize the number of Hispanics in the Travis County portion of CD35. It is clear, however, that whatever population Downton chose to include in the Travis County portion of CD35, he included because that population was Hispanic and not for other reasons. *See*, e.g., TrA1673-1674 (Downton stating that he included "the Hispanic areas of Travis County" in CD35), Tr989 (with regard to an area

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[32] The Court notes that the only traditional redistricting principles that Downton could say he complied with in Travis County were "[r]edistricting for partisan purpose[s], protecting incumbents, [and] compliance with the Voting Rights Act with respect to 35." TrA1781 (Downton). The Court further notes that CD35 was not drawn to protect incumbent Lloyd Doggett, whose district CD25 was primarily affected by CD35. TrA1781 (Downton) (stating that he protected Congressmen Flores, McCaul, and Smith).

in north central Austin included in CD35, he said, "If that is a Hispanic area, and I think it is likely that it is, then, yes, it would have been included in District 35 as we were trying to create a Hispanic majority district.").

Downton admitted to drawing the Travis County portion of the district using racial shading in order to find concentrated Hispanic populations to include in CD35. TrA1674-75 ("At some point in trying to get District 35 over the 50 percent threshold, I also turned on racial shading for Travis County to find the concentrated Hispanic populations to draw them in to get over the 50 percent benchmark."). This led to some precinct splits, including the Precinct 433 split to divide St. Edward's University to place the dorms (with large Hispanic student population) into CD35, while placing the administration building in CD21, and the Precinct 440 split to include an arrowhead shape containing the Riverside apartments (a more Hispanic population) within CD35. Tr1198-99 (Butts); TrA1631 (Downton) (stating that sometimes splitting precincts was required by the VRA).[33] Downton admitted that the "squiggle" at the northern part of CD35 was included to increase Hispanic population, and racial shading confirmed that this area was 90-100% Hispanic. Tr989 (Downton). He also noted that he split the African-American community in East Austin because he had to include some of that

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[33] *See Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 670 (5th Cir. 2009) (noting that "it is obviously questionable whether splitting members of geographically contiguous communities in interest, *i.e.*, the colleges, into separate constituencies would have been legally satisfactory" and "[a]ny plan that split USM into multiple wards, furthermore, would be highly suspect on its face").

population in CD35 "to create a conduit to pick up the rest of the Hispanic population in the northwest part of 35." TrA1779 (Downton).[34] When asked why he wanted "to go up to the northwest part of 35 to join Hispanic population to south San Antonio," he responded, "Because we were trying to create a Hispanic opportunity district that was over 50 percent HCVAP." *Id.* Downton admitted that he paid no attention to the City of Austin boundaries. TrA1782 (stating he did not pay attention to City of Austin boundaries when drawing CD35). The CD35 district lines in Travis County do not match up with any city boundaries, with House districts, or with any recognizable communities of interest other than race. TrA1780-81

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[34] Although Downton testified that he made efforts in the DFW area to "keep the black population together" in a district, he knowingly split the African-American population in Austin because, as he said, including "that block [an African-American block] was necessary to create a conduit to pick up the rest of the Hispanic population in the northwest part of 35." TrA1779 (Downton). Thus, whereas Downton felt that "keeping the black population together" in DFW was part of the traditional redistricting principle of keeping communities of interest together, he was willing to split up this Austin African-American population to reach an HCVAP-majority in CD35. Further, Downton was aware that African-American voters in Travis County are strongly cohesive Democrats, and if he had simply been including Democrats in CD35, he would not have felt that including this African-American population "was necessary" to achieve his goal of including Hispanics, further evidencing that his goal was simply to include Hispanics. (The Court also notes that Defendants have not seriously contended that certain populations were included in CD35 because they were Democrats (as opposed to Hispanics), but they have instead asserted that creation of CD35 furthered the political goal of attempting to unseat Doggett. As discussed herein, that racial criteria are used to further a political goal does not negate or excuse the use of racial criteria.)

(Downton) (agreeing that the various House districts were divided among several congressional districts); TrA1776 (Downton) ("I think I kept the Hispanic community of interest in east Austin together in District 35.").[35]

In the Bexar County portion of CD35, Downton included areas with high percentages of Hispanic residents and voters and excluded less Hispanic areas. Downton 8-12-11 depo. (Joint Ex. J-62) at 116 (noting that they tried to raise Hispanic percentages in CD35 by including Hispanics from Bexar County); *id.* at 120 (noting that the fact that CD35 is narrow in northern Bexar County is a "Voting Rights Act issue" because "[t]hat northeastern part of Bexar County has a very low concentration of Hispanics, so if we had widened that out up there, it would cause a problem in keeping another majority Hispanic district"); TrA1642-43 ("So in creating District 35, originally, we took a lot of Hispanics out of

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[35] Defendants also state that CD35 reflects the significant Hispanic growth in this area. However, Travis County was not an area of significant Hispanic growth compared to other areas of the State, and in fact Anglo growth kept pace with Hispanic growth. *See, e.g.*, TrA936 (Ansolabahere) (noting that Travis County was the one area where Anglo growth roughly kept pace with minority growth); D-222 (Gonzalez-Baker Table 2) (showing an increase in HCVAP in Travis County between 2000 and 2010 from 102,342 to 126,810 (approximately 24,000), compared to an increase of almost 50,000 in Dallas County, 42,000 in Tarrant County, and 120,000 in Harris County). In terms of percentage increases, Exhibits D-230 (2000 census) and D-231 (2008-2012 ACS) show that the percentage HCVAP of Travis County increased from 18.86% to 21.05%, while Nueces County increased from 50.97% to 55.87%, Tarrant County from 11.37% to 15.44%, Dallas County from 14.11% to 20.39%, and Harris County from 19.04% to 25.36%.

District 20 to put them into District 35"; and after moving some Hispanic population to increase Hispanic numbers in CD20, "we had to get additional Hispanic population into District 35 to replace what we were giving back to 20, and then we took that from 23"); TrA1752-53 (stating that he did not know about or attempt to consider actual communities of interest in San Antonio, and that he was trying to create districts under the VRA and was "required to consider race to create those"); Davis depo. (Agreed Ex. J-58) at 99-100 (noting that the downtown San Antonio area moved from its historic location in CD20 to the new CD35 was a "Latino community that . . . the policymakers chose to use as a base for the new 35th district"). Further, as discussed more fully in the fact findings, although Rep. Kuempel wanted Guadalupe County kept whole in CD15 and mapdrawers wanted to keep small cities whole, these goals were compromised to keep the HCVAP of CD35 above 50%. TrA1655, TrA1663 (Downton).

The evidence is clear that racial considerations predominated in the determination of what population to include in CD35.[36] That Downton and the Legislature also had the purpose of using CD35 to try to unseat Lloyd Doggett (who lives in Austin/Travis County) does not negate the finding that they used race to do so. *See Shaw*, 517 U.S. at 907 (noting that the fact that the legislature

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[36] In accordance with the Supreme Court's recent pronouncement in *Bethune-Hill v. Virginia State Board of Elections*, __ U.S. __ (2017), the Court makes clear that although it has analyzed certain portions of CD35 in isolation for evidence that race predominated and that traditional redistricting principles were subordinated to race, its finding that race predominated in the drawing of the district applies to the district as a whole.

addressed other interests, including creating one rural and one urban district and partisan politicking, "does not in any way refute the fact that race was the legislature's predominant consideration"); *Bush*, 517 U.S. at 959, 962 (finding that race was the predominant factor even when the redistricting process was not "purely race-based"); *Clark v. Putnam Cty.*, 293 F.3d 1261, 1270 (11th Cir. 2002) ("[The] fact that other considerations may have played a role in . . . redistricting does not mean that race did not predominate."); *Harris v. McCrory*, 159 F. Supp. 3d 600, 615 (M.D.N.C. 2016) (even in a "mixed-motive suit"—in which a state's conceded goal of "produc[ing] majority-minority districts" is accompanied by "other goals, particularly incumbency protection"—race can be the predominant factor in the drawing of a district without the districting revisions being "purely race-based"), *probable jurisdiction noted*, 136 S. Ct. 2512 (2016) (No. 15-1262).

The Legislature could have simply divided Travis County and Austin Democrats among five Republican districts to unseat Doggett. They did not do so, as the evidence demonstrates (including the supplemental report of Dr. Ansolabahere, showing that the district lines correspond more strongly with race than with party affiliation). Downton chose which population to include in CD35 on the basis of race, not political affiliation.[37] He

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[37] Again the Court finds this case to be distinguishable from *Easley v. Cromartie*, 532 U.S. 234 (2001). This is not an issue of whether population was included in CD35 because they were Hispanic or because they were Democrat. Rather, mapdrawers relied on race to create a majority-HCVAP district and advanced political motives (dividing Travis County/Austin Democrats among numerous districts, unseating Doggett, limiting the number of Democrat districts) by doing so.

created a Hispanic-majority district so that he could use the creation of exactly such a district (which appeared to be friendly to Hispanic voters and in compliance with the VRA) to fulfill a political motive of unseating Doggett in part by putting Doggett's Hispanic constituents in a Bexar-County weighted district.[38] And placement of a new VRA district in part in Travis County allowed the Republican-dominated Legislature to create a new majority-minority district while simultaneously destroying an existing Democrat district, in accord with the objective to create a "3-1 map" that increased the number of Republican seats by three and Democrat seats by only one. The fact that creation of an HCVAP-majority district also fulfilled a political goal does not mean that the district was not created with race as the predominant consideration. The Court thus finds that race predominated in the drawing of CD35 and that strict scrutiny applies.[39]

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[38] Downton and the Republican-dominated Legislature used the intentional creation of a Hispanic-majority district that extended in large part into Travis County to justify its destruction of Travis County-based CD25, which it knew had a substantial minority population that was successfully electing its candidate of choice, a Democrat. Because the Court finds below that CD35 is an invalid district under *Shaw*, it does not reach the Rodriguez Plaintiffs' alternative argument that CD25 was a protected crossover district and that its destruction also violated the Equal Protection Clause.

[39] Judge Smith contends that because mapdrawers had a political motive, race did not predominate in the drawing of CD35. While this Court agrees with Judge Smith that, ultimately, many issues in this case boil down to "whether the congressional lines in the challenged districts were drawn for racial or partisan purposes," the Court still must conclude from the evidence that the congressional lines in CD35 were drawn for racial reasons, even if the ultimate location of CD35

was based in part on the partisan goal of unseating Doggett. In fact, the Court agrees that mapdrawers viewed the central Texas configuration as a "threefer" in terms of fragmenting Travis County, unseating Lloyd Doggett, and creating a Latino opportunity district along the Austin/San Antonio I-35 corridor. That the first two goals were furthered by placing the new Latino opportunity district in part in Austin does not undermine the conclusion that race predominated in the drawing of CD35.

It is undisputed that mapdrawers intended CD35 to be a Latino opportunity district, meaning it had to have over 50% HCVAP, and that this was the overriding criterion that could not be compromised in drawing the district. Downton admitted repeatedly to this being the ultimate criterion and to including population within and without the district for purely racial reasons, and traditional redistricting criteria were subordinated to race throughout the district. In that regard *Easley v. Cromartie* is easily distinguished and actually bolsters the Court's conclusion. In that case, the mapdrawers argued that they placed population into the district because they were Democrats, who also happened to be African-American, and that therefore politics, not race, shaped the district. The task was distinguishing a legislative effort to create a majority-African-American district from a legislative effort to create a safely Democratic district. *Easley*, 532 U.S. at 239. Here, in contrast, it is admitted that Downton placed population in the district because they were Hispanic, not because of their political characteristics. There was no argument or evidence that any population was included or excluded from the district based on partisan criteria (as distinguished from the political motive of using the race-based district to unseat Doggett). The fact that mapdrawers had the purpose of using CD35 to try to unseat Doggett and limit the number of Democrat districts statewide does not negate the fact that they used race as their tool and intentionally drew CD35 based predominantly on race. The political motive does not excuse or negate that use of race; rather, the use of race is ultimately problematic for precisely that reason—because of their political motive, they intentionally drew a district based on race in a location where such use of race was not justified by a compelling state interest.

As noted, to survive strict scrutiny, the challenged districting plan must be narrowly tailored to serve a compelling governmental interest. *Bush*, 517 U.S. at 976. Compliance with § 2 of the VRA constitutes a compelling governmental interest. *Id.* at 994 (O'Connor, J., concurring); *Clark v. Calhoun Cty.*, 88 F.3d at 1405. However, Defendants must do more than simply assert that they were attempting to comply with the VRA to survive strict scrutiny. "[T]he State must have a strong basis in evidence for concluding that the three *Gingles* preconditions exist in order to claim that its redistricting plan is reasonably necessary to comply with § 2." *Clark v. Calhoun Cty.*, 88 F.3d at 1405-06; *see also Shaw*, 517 U.S. at 915; *Bush*, 517 U.S. at 978 ("The State must have a 'strong basis in evidence' for finding that the threshold conditions for § 2 liability *[i.e.*, the *Gingles* preconditions] are present.").

Here, the Task Force Plaintiffs (who proposed a new Travis County/Bexar County Latino opportunity district during the legislative session) contend that CD35 is an appropriate § 2 district because it satisfies all *Gingles* criteria. *See* docket no. 460 at 16-18; docket no. 638 at 36.[40] The Task Force Plaintiffs offered some evidence in support of their position that the Hispanic populations of Travis and Bexar Counties are a community of interest that form a compact minority community for purposes of § 2. Defendants also argue that Southeast Austin and the

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[40] In 2011, Defendants actually asserted that CD35 is not required by § 2; instead, they argued (as discussed) that racial considerations did not predominate in the drawing of the district. Docket no. 411 at 57 (ECF page 69). It is not clear whether Defendants maintained this position post 2014-trial.

Southside and Westside of San Antonio "are major urban areas sharing common interests" and "[i]t is not unusual for Austin and San Antonio to be combined in the same congressional district."[41] Docket no. 1272 at 125. Other Plaintiffs refute these assertions and contend that CD35 is not compact. The Rodriguez Plaintiffs further argue that CD35 is not properly drawn in Travis County because voting there is not racially polarized.

Although the Court is inclined to find that CD35 is not compact for § 2 purposes, it need not decide this issue because CD35 is invalid for another reason—there is no racially polarized voting in Travis County, such that the third *Gingles* precondition is not present in a significant portion of the district. *See Bush*, 517 U.S. at 979 (finding that challenged districts could not be considered narrowly tailored to avoid § 2 liability when one *Gingles* precondition was not fulfilled, even if the Court assumed the other two preconditions were met). Evidence from county-level elections shows substantial Anglo crossover voting and shows that the Anglo majority does not usually defeat the minority-preferred candidate. More importantly, as the history of benchmark CD25 demonstrates, Travis County Hispanic (and African-

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[41] The Court notes, however, that Austin has also been joined with parts of Houston in a congressional district (in both the benchmark and the enacted plan), but obviously that fact alone does not mean that the minority community within the district is a compact minority community for § 2 purposes. The fact that the State chooses to combine certain communities in a non-racially (but politically) gerrymandered district does not mean that a different district that also combines parts of those communities is not racially gerrymandered or complies with § 2, or that the minority communities in a similar district are compact for § 2 purposes.

American) voters could be included in a non-racially gerrymandered district with an Anglo majority and still elect minority-preferred candidates because the Anglo majority did not vote to defeat the minority-preferred candidate. Therefore, there was no strong basis in evidence to include Travis County Hispanic voters in a racially gerrymandered district because they had no § 2 right to remedy; inclusion of Travis County Hispanic voters based on their race was not narrowly tailored to serve a compelling state interest.[42]

Mapdrawers and the Legislature may have had a strong basis in evidence for believing that § 2 required seven Latino opportunity districts in South/West Texas, but they had no basis in evidence to believe that the *Gingles* preconditions were satisfied in Travis County such that a race-based majority-Hispanic district should be drawn there.[43] There is no § 2 violation in Travis

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[42] *See also Moon v. Meadows*, 42 952 F. Supp. 1141, 1150 (E.D. Va.), *aff'd sub nom. Harris v. Moon*, 521 U.S. 1113 (1997) (finding that racially gerrymandered minority district failed to survive strict scrutiny because defendant failed to show that Anglo bloc voting usually defeated the minority-preferred candidate and district's compactness was doubtful); *Harris*, 159 F. Supp. 3d at 623 (noting that a failure to establish any of the three *Gingles* preconditions is fatal to defendant's assertion that a racially gerrymandered district is narrowly tailored to serve the compelling state interest of complying with the VRA).

[43] Rather, the Legislature heard testimony (from Rep. Dawnna Dukes, Rep. Elliot Naishtat, and Sen. Kirk Watson from Austin/Travis County) that Anglos, Hispanics, and African-Americans worked in coalition (*i.e.*, voting was not racially polarized) and that, despite their Anglo-majority status, Austin and Travis County regularly elected minority candidates of choice. Defendants' expert Dr. Alford testified that there was "no question" that there

County, and where there is no § 2 wrong there cannot be a § 2 remedy. *Shaw*, 517 U.S. at 916 (quoting *Growe v. Emison*, 507 U.S. 25, 40-41 (1993)). Just as a state may be in violation of § 2 if it draws a noncompact majority-minority district and the plaintiffs' proposed alternative districts would be compact, *see LULAC*, 548 U.S. at 429-31, a state may be in violation of § 2 if it draws a district that does not substantially address the § 2 violations or is otherwise not narrowly tailored to the State's professed interest in avoiding § 2 liability when compliant districts could be drawn. *Shaw*, 517 U.S. at 911, 915. *Cf. Miller v. Johnson*, 515 U.S. 900, 921 (1995) (compliance with the VRA cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws).

To be a compelling interest, the state must show that the alleged objective was the Legislature's actual purpose for the discriminatory classification and the Legislature must have a strong basis in evidence to support that justification before it implements the classification. If avoidance of § 2 liability is asserted to be the State's compelling state interest, "the racial classification would have to realize that goal; the legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored." *Shaw*, 517 U.S. at 916. In other words, the legislative action should substantially address, if not achieve, the avowed purpose. *Id.* at 915.[44]

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was not racially polarized voting in Travis County. Alford depo. (Joint Ex. J-43) at 255.

[44] Additionally, the challenged district "must not subordinate traditional districting principles to race substantially more than is

If a § 2 violation is proved for a particular area, it flows from the fact that individuals in that area have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. *Shaw*, 517 U.S. at 917. There is no indication that mapdrawers or the Legislature drew CD35 in Travis County because they felt that Hispanic voters there had a § 2 right that needed a remedy. Rather, they drew CD35 as an HCVAP-majority district that extended into Travis County for the purpose of eliminating the existing district in which minorities and Anglos together elected a Democratic candidate (and to unseat that candidate). In this way, they were able to create the facade of complying with § 2 while actually minimizing the number of districts in which minorities could elect their candidates of choice despite the massive minority population growth that had occurred throughout the state.[45] Plaintiffs have shown, and mapdrawers were

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'reasonably necessary' to avoid § 2 liability." *Bush*, 517 U.S. at 979. Of course, the State is not prohibited from drawing majority-minority districts *per se*, *Voinovich*, 507 U.S. at 155, nor does § 2 prohibit the creation of a non-compact majority-minority district, *LULAC*, 548 U.S. at 430, but if the State allows race to predominate the drawing of a majority-minority district such that strict scrutiny is triggered, its race-based districting must be narrowly tailored to serve a compelling state interest.

[45] Downton testified that he did not think CD35 was necessary for § 5 compliance, and he was not sure if it was required by § 2, but he thought a court might find it was required by § 2. Tr987-88; Downton 8-12-11 depo. (Ex. J-62) at 113-14 (stating that CD35 was not required by § 5 and he was not sure if it was required by § 2 because it was "just minimally a majority Hispanic district" and he felt that drawing it was maximizing Hispanic opportunity districts); TrA1636-38, TrA1696-97 (stating his position that enacted CD23 was the same as

in the benchmark, a not-performing Latino opportunity district, such that there was no retrogression, but "even if it turned out that it was a Section 5 district and became not a Section 5 district, we had a replacement district, so there wasn't additional Section 5 analysis"). He testified that he was the one who "made the call" on these issues, including whether CD23 counted as a § 5 district. TrA1639-40. He also testified that he had been instructed to draw a new § 2 district in the plan, and when he saw MALDEF's proposal that included the district extending into Travis County, he decided to use that district. There is no indication that he had any evidence, much less a strong basis in evidence, to support the inclusion of Travis County in the new § 2 district when he decided to place the district there. Rather, he chose that location to fulfill the goal of drawing a new § 2 district while drawing a "3-1 map" that had only one new Democrat district. TrA1769 (Downton) (noting that CD35 would be a Latino opportunity district and it replaced a "different Democratic district" (CD25)); TrA1782 ("With respect to having the Democrat elected to Congress, there was not likely to be one elected from 25. There would be one elected from 35."); TrA1809 ("It was the issue of Democratic district. We created two new minority districts, but took away one non-minority Democratic district.").

Further, there is no evidence that any member of the Legislature, including Chairmen Solomons and Seliger, had any basis in evidence for believing that CD35 was required by § 2 other than its HCVAP-majority status. Solomons repeatedly stated that he relied on his staff, primarily Downton, to make legal determinations for him, and Downton repeatedly testified that his sole criteria for a § 2 district was whether it was above 50% HCVAP. Both Downton and Solomons indicated that CD35 was created because it could meet the majority-HCVAP threshold (and fulfill the 3-1 map goal), not because all of the *Gingles* factors were satisfied. Solomons depo. (Ex. J-60) at 134-36 (noting that the proposed DFW district was rejected because it did not meet the 50% threshold and the MALDEF proposal was selected because it could meet the threshold); *id.* at 143 ("it just seemed to me that that central part, that part of Texas made a good place for a district, if the numbers worked"). Solomons apparently believed that Seliger's staff was more knowledgeable about the Congressional plan than his own staff because the plan was initially

aware, that seven Latino opportunity districts could be drawn in South/West Texas without including Travis County. The Legislature's objective in drawing CD35 in Travis County was not to remedy a § 2 violation but to eliminate a Democratic district to offset the required creation of a new § 2 district, and the use of race for political advantage rather than compliance with the VRA cannot survive strict scrutiny. CD35 therefore violates the Equal Protection Clause and, as will be discussed, Plan C185 does not "substantially address" the § 2 violation in South/West Texas.

4. CD27/Nueces County § 2 claims

The Legislature's decision to place CD35 in Travis County ties into Plaintiffs' other claims that there is an unremedied § 2 violation for Hispanic voters in Nueces County, which was placed into Anglo-majority CD27. In *LULAC v. Perry*, the Supreme Court reemphasized[46] that creation of a district not required by § 2 (because it was not compact for § 2 purposes) could not remedy a § 2 violation elsewhere in the state. Though a § 2 plaintiff does not always have a right to be placed into a minority opportunity district as a remedy, and the State retains broad discretion in drawing districts to comply with the mandate of § 2, these principles have limits. *LULAC*, 548 U.S. at 429. The State may "use one majority-minority

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released by the Senate, even though his own counsel Ryan Downton was the primary architect of the Congressional plan. *Id.* at 151-52.

[46] The Supreme Court previously held in *Shaw* that even if a state legislature has a strong basis in evidence for determining that a § 2 violation exists in one part of the state, it cannot remedy that violation by drawing a majority-minority district in a different part of the state. *Shaw*, 517 U.S. at 916.

district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be accommodated." *Id.* "Simply put, the State's creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right." *Id.* at 430.

In this case, the State intentionally created a § 2 majority-Latino district that included substantial population (215,626 persons in Travis County, 21% of the district's population) that did not have a § 2 right because the third *Gingles* precondition (Anglo bloc voting) does not exist in Travis County. Travis County minority voters could be included in an Anglo-majority district (such as benchmark CD25) and still elect their preferred candidate. At the same time, Plaintiffs demonstrated that approximately 200,000 Hispanic voters in Nueces County (a majority-HCVAP county) had a § 2 right that could be remedied but was not.

Numerous maps showed that seven compact Latino opportunity districts could be drawn in South/West Texas and that Nueces County Hispanics could be included in one of those districts for § 2 purposes.[47] Instead, they were placed in an Anglo-majority district where they have no opportunity to elect their preferred candidates. Thus, by including Hispanic voters in Travis County (who did not have a § 2 right) in CD35 but excluding Nueces County

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[47] Plans were submitted during the legislative session and during this litigation that showed that seven compact districts could be drawn that included all or most Nueces County Hispanic voters but not Travis County voters (*see, e.g.*, Plans C123, C163, C164, C201, C208, and C220).

Hispanics (who did have a § 2 right) from a Latino opportunity district, Plan C185 does not "substantially address" the § 2 liability in South/West Texas. *Shaw*, 517 U.S. at 915 ("the legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored"); *Dillard v. City of Greensboro*, 946 F. Supp. 946, 956 (M.D. Ala. 1996) ("Because the State has a compelling interest only in remedying the § 2 violation, a plan would be narrowly tailored and thus survive strict scrutiny only if it substantially addresses the [§ 2] liability . . . .") (internal quotation marks omitted); *see also Wilson v. Jones*, 130 F. Supp. 2d 1315, 1322 (S.D. Ala. 2000), *aff'd sub nom. Wilson v. Minor*, 220 F.3d 1297 (11th Cir. 2000) (discussing *Shaw's* requirement that the district restore rights to the specific persons affected by the potential violation).

Defendants argue that the reconfiguration of CD27 and the creation of CD34 preserves the core of former CD27 and makes it more likely to perform. Docket no. 411 at 32. However, that argument ignores the § 2 rights of Nueces County Hispanic voters and Supreme Court precedent. Defendants' expert Dr. Alford noted that what happened to the Hispanic voters in Nueces County was similar to what happened to Hispanic voters in CD23 during the 2006 redistricting—a majority-Hispanic district that would likely have elected the Hispanic-preferred candidate was flipped into an Anglo-majority district to protect a candidate that was not preferred by the Hispanic voters. Tr1829, Tr1832, Tr1837 (Alford). The Supreme Court found that to be a violation of § 2 for the Hispanic voters who no longer had an opportunity to elect because they were no longer part of a Hispanic voting majority. Increasing electoral ability or performance for

some voters in former CD27 cannot offset the loss of opportunity suffered by Nueces County Hispanic voters when *all* the voters' § 2 rights can be accommodated.

Although Defendants contend that there is no racially polarized voting in Nueces County, that claim is disproved by the evidence. Assuming that looking at Nueces County in isolation (as opposed to in a congressional district[48]) is the proper focus, all of the expert testimony on the issue showed the existence of racially polarized voting in Nueces County. Dr. Ansolabahere found very high Anglo voter cohesion in Nueces County, and Anglo support for minority-preferred candidates is very low; only about 10 to 15% of Anglo voters support minority-preferred candidates. TrA943 (Ansolabahere). Dr. Engstrom testified that the bivariate analysis of statewide elections from 2006 to 2010 revealed racially polarized voting in both general and primary elections in Nueces County. Tr503 (Engstrom); Engstrom Rebuttal Report (docket no. 307-1) at 7 & Table 2. In his original report (Joint Expert Ex. E-7), Dr. Engstrom found that Latinos are highly cohesive in support of Latino candidates with the Democratic party nomination in general elections—all five got strong support (all point estimates were >90% on the bivariate analysis). The only Latino Republican, Guzman, was not supported. Further, all Latino candidates in Democratic primaries received strong Latino support (78.4% (Noriega), 90.5% (Cruz), 95%

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[48] *See Clark v. Calhoun Cty., Miss.*, 21 F.3d 92, 97 (5th Cir. 1994) (elections involving the particular office at issue are more relevant than elections involving other offices such that limited minority success in municipal elections did not demonstrate equal opportunity in county-wide elections).

(Yanez), 83.9% (Chavez-Thompson), and 91.5% (Uribe)). Latinos voting in Republican primaries did support the Latino candidate running for Railroad Commissioner (Carrillo, 84.2%), but not for Governor (Medina, 28.2%). *Id.* at 12-13.

Non-Latino voters provided little support to any of the five Latino candidates favored by Latino voters in general elections, according to the bivariate analysis (support ranged between 11.2% and 17.6%). They did support the only Republican candidate that was a Latino (Guzman) with an estimated 78%. They did not provide majority support to any of the Latinos seeking nominations in the Democratic primaries and did not favor either Latino candidate in the Republican primaries (10.3% for Medina and 21.8% for Carrillo). Dr. Engstrom concluded that Latinos in Nueces County are very cohesive in their candidate preferences for Latino candidates, in both general elections and Democratic primaries, but their preferences were not shared by non-Latino voters in any elections analyzed. *Id.* at 13.

Engstrom's rebuttal report has similar findings: Latino voters in Nueces County "have been strongly cohesive in their support of Latino candidates with the Democratic Party nomination in general elections." Docket no. 307-1 at 5. All seven such Latino candidates received "strong support" from Latino voters—each candidate received over 90% of the Latino vote, with the range being from 90.1% to 97.8%. *Id.* at 6. In none of the elections analyzed did non-Latino voters share that preference, and their support ranged from 7.5% to 17.6%. *Id.* All of the Latino candidates in the Democratic primaries "also received strong support from the Latino voters in Nueces County." *Id.* Their estimated support

range was 78.4% to 96%, with four of the six exceeding 90%. *Id.* Non-Latinos did not provide majority support in any of these primaries, with their support estimates ranging from 29.7% to 46.6%. *Id.* In the 2010 Republican primary for Railroad Commissioner, Latinos supported the Latino incumbent with 84.3% support, while non-Latinos did not support him (21.8%). *Id.*[49]

To the extent Defendants have argued that racially polarized voting is not legally significant when Latino cohesion falls below 80% or Anglo crossover voting is significant, *see, e.g.*, docket no. 411 at 49-50; docket no. 1276 at 92 (proposed FF 860: "Plaintiffs have failed to demonstrate that racially polarized voting in any Texas county is legally significant."), the level of racial bloc voting in Nueces County is legally significant even under Defendants' standards.[50] In addition, to the extent

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[49] In the 52-county area he defined as South Texas, Dr. Engstrom also found racially polarized voting. Tr503. He found Latino cohesion for the Latino candidate with the Democratic Party nomination exceeding 80% (the range was 80.5% to 88.5%) while non-Latinos ranged in support between 13.1% and 19.1%. Docket no. 307-1 at 7. In addition, Latino candidates in the Democratic primaries also received "strong support" estimated to be greater than 80% (ranging from 76.8% to 93.5), with non-Latinos providing between 26.1% and 39.11% support. In the 2010 Republican primary for Railroad Commissioner, Latinos provided 69.73% support and non-Latinos provided only 25.5% support. *Id.* at 8.

[50] Defendants have not challenged Dr. Engstrom's qualifications, methodologies, or results. Dr. Alford stated that Dr. Engstrom's EI methodology was good and that his report was credible. Tr1765, Tr1859; Alford depo. (Joint Ex. J-43) at 111-12. Dr. Engstrom's data, in addition to the other expert data, demonstrate the existence of legally significant polarization sufficient to satisfy *Gingles*. Dr. Alford acknowledged that there was significant variation in Hispanic voter cohesion across the state. Tr1785, Tr1848. Dr. Engstrom's analysis

Defendants assert that the cause of polarized voting is partisanship and not race, Plaintiffs have sufficiently rebutted that evidence by showing that voting is sufficiently racially polarized in the primaries, where partisanship plays no role. Specifically, Latinos were highly cohesive (84.3%) in support of the Latino candidate Victor Carrillo (the incumbent) in the 2010 Republican Primary for Railroad Commissioner, while non-Latinos provided only 21.8% support, and Carrillo was defeated.[51] In addition, although voting is not as racially polarized in the Democratic primaries, Latino cohesion remains high (ranging from 78.4% to 95% in regular primaries and reaching 96% in the 2006 runoff for Lt. Governor) and although non-Latino/Anglo crossover voting is higher (ranging from 29.7 to 46.6%), non-Latinos did not provide

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shows that Latino voters in Nueces County were consistently cohesive in the 90% range, while non-Latino voters were highly cohesive in voting for the non-Latino-preferred candidate and provided weak support to the Latino-preferred Latino candidate (between 7.5 and 17.6%) in the 2006, 2008, and 2010 general elections he studied. Engstrom Corr. Rebuttal Report (docket no. 307-1) at 32 (Table 2). Dr. Alford stated that such levels of bloc voting were legally significant. Tr1846.

[51] In his 2014 supplemental report, Dr. Engstrom found that in the Republican primary runoff election for Texas Supreme Court Place 4, 68.6% of Latino voters support Medina, while 34.4% of non-Latino voters did. TrA481 (noting that he found polarized voting in some counties but not others in this election); PL-967. He did not find racially polarized voting in the Cruz Republican primary election, but he also noted that Latinos did not support Cruz in the general election either, and there are such low participation rates by Latinos that it did not provide effective analysis. TrA482. He also noted that none of the results of his 2012 analysis altered his prior conclusions regarding racially polarized voting since that analysis was more extensive in terms of the number of elections analyzed.

majority support to the Latino-preferred Latino candidate in any of the primaries Engstrom evaluated.

Dr. Engstrom also found high Latino cohesion in the HD33 election in 2010, with Solomon Ortiz, Jr. receiving an estimated 92.3% of the Latino vote, while non-Latinos provided only 11% support. Docket no. 307-1 at 25; Tr510 (Engstrom). Dr. Kousser also found that contests in HD33 between 2002 and 2010 were "starkly racially polarized," with Latino voters overwhelmingly supporting the Democratic candidates. Joint Expert Ex. E-2 (Kousser report) at 87 n.55, Tables 12-14.[52]

Dr. Brischetto similarly found racially polarized voting in the 2012 HD34 election in Nueces County[53] as well "a high degree of racially polarized voting between Latinos and non-Latinos" in the other elections analyzed. TrJ937-38 (Brischetto). Dr. Brischetto analyzed ten general elections in Nueces County in 2012 and characterized the racially polarized voting between Latinos and non-Latinos as "extreme." TrJ992; Brischetto Report (MALC-161) at ¶ 48. Dr. Brischetto found that Latinos had a high level of cohesiveness, with

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[52] Table 14 shows Kousser's results using ecological inference. In 2002, Latinos supported Luna with 97.3% of their vote, while non-Latinos provided majority support (63.5%) to Cuellar. In 2008, Latinos supported Ortiz with 93.2% of their vote, while non-Latinos provided majority support (66.6%) to Torres. In 2010, Latinos supported Ortiz with 86.3% of their vote while non-Latinos provided strong support (89.6%) to Torres. Tables 12 and 13 (reflecting the results of other methodologies) display similar results.

[53] Latino support for Herrero, the Latino candidate, was 95.55% while non-Latino support was 11.09%. Non-Latino support for Scott, the Anglo, was 88.91%, while Latino support for Scott was 4.45%. TrJ937 (Brischetto); Brischetto Report (MALC-164) Table 4.

their support for the minority/Latino candidate above 90% in nine of ten general elections. TrJ969 (Brischetto); Brischetto Report Table 4. He also found that Anglo bloc voting was sufficient to usually defeat the Latino-preferred candidate. *Id.*; MALC-164.

Although Dr. Brischetto did not find extreme differences and did not think voting was racially polarized in the Democratic primary for CD27, he did find racially polarized voting in the race for Democratic Party Chair, where Latinos supported the Latino candidate with 90% of their votes and non-Latinos supported the non-Latino candidate with 60% of their votes. TrJ944; Brischetto Report ¶ 50, Table 4. He also found racially polarized voting in three of five Republican primary elections. TrJ942-43; Report ¶ 49, Table 4. Those three elections involved head-to-head contests between a Latino and non-Latino candidate, while the other two involved three or more candidates. TrJ943 (Brischetto); Brischetto Report Table 4.[54]

Defendants fail to cast doubt on any of these findings and conclusions. Instead, Defendants contend that there is no racially polarized voting because minority-preferred candidates have won a number of elections in Nueces County. Accordingly, Defendants contend that the third *Gingles* factor—that the Anglo majority votes sufficiently

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[54] In the Senate primary, Latinos split their vote primarily between Cruz, the Latino candidate (41.77%), and Dewhurst (42.35%) and there was a fairly large error range. TrJ939 (Brischetto). In the Supreme Court Place 4 race, Latinos supported Medina with 69.5% of their votes but Anglos supported Medina with 36.21% of their vote and Devine with 43.19% of their vote, leading Dr. Brischetto to say that although voting was racially polarized, he would not call it highly racially polarized. TrJ941.

as a bloc to enable it usually to defeat the minority-preferred candidate—is absent. However, in those elections, minorities had a sufficiently large majority to overcome the Anglo bloc voting. Dr. Brischetto explained that the minority candidate does win when the district is over 66% minority. TrJ996 (Brischetto). In districts that were less than 50% minority, however, Anglo bloc voting defeated the minority-preferred candidate all but one time. *Id.*. The fact that minority candidates can win when they have a super-majority does not disprove the existence of racially polarized voting.

Moreover, looking instead at a district level[55] (as opposed to the county in isolation), placement of Nueces

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[55] Dr. Engstrom found racially polarized voting in the 2010 general election for CD27. Tr510 (Engstrom); Engstrom Corr. Rebuttal Report (docket no. 307-1) at 25. The incumbent Ortiz received an estimated 86.6% of the votes cast by Latinos and only 15.9% of those cast by non-Latinos. *Id.*; Tr509-10 (Engstrom). Dr. Kousser also found racially polarized voting in the 2010 general election for CD27 using various methodologies. Tr226 (Kousser) (noting that, using ordinary least squares method, Latinos voted 85% for Ortiz and only 13.4% for Farenthold) (Joint Expert Ex. E-2 at 42-44, Table 12) (non-Latino support for Ortiz was 8%); Joint Expert Ex. E-2 at 45-47, Table 13 (using least squares weighted by votes, Ortiz received 81.9% of Latino support and 9.3% of non-Latino support); Joint Expert Ex. E-2 at 48-50, Table 14 (using ecological inference method, Ortiz received 80.6% of Latino vote and 10.7% of non-Latino vote, and Latinos provided only 12.4% support for Farenthold). Using homogeneous precinct analysis, Dr. Ansolabahere also found racially polarized voting in the 2010 general election for CD27, and found that it was greater in that race, which involved an Anglo Republican and a Hispanic Democrat, than the 2010 gubernatorial race between two Anglo candidates, indicating that race played a role in addition to partisanship. Joint Expert Ex. E-15 at 36. Benchmark CD27 was a Latino opportunity district, and the § 2 rights of those Hispanic voters

County Hispanics in an Anglo-majority district ensures that the Anglo majority usually will defeat the minority-preferred candidate, given the racially polarized voting in the area, and thus those Hispanic voters lack opportunity. CD27 in Plan C185 is a district in which Latino voters have no opportunity to elect their preferred candidates. In contrast, past performance of benchmark CD27 (as well Plaintiffs' proposed plans) demonstrates that Nueces County can be placed in a majority-HCVAP district that provides Latino opportunity.

Plaintiffs have thus shown that a district could be drawn in which Hispanics, including Nueces County Hispanics, are sufficiently numerous and geographically compact to constitute a majority HCVAP. They have also shown that racially polarized voting exists such that an Anglo-majority would usually defeat their preferred candidate. They satisfy the *Gingles* preconditions, and a consideration of the totality of circumstances leads the Court to conclude that they have a § 2 right. A searching practical evaluation of "past and present reality" and a functional view of the political processes indicates that the political processes are not equally open to Hispanics. Texas's history of official discrimination touching on the right of Hispanics to register, vote, and otherwise to participate in the democratic process is well documented and has been discussed above. Similarly, as discussed, the evidence indicates that Latinos bear the effects of past discrimination in areas such as education and

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in Nueces County were intentionally taken away to protect the Republican incumbent. *See* Tr514 (Engstrom) (noting CD27's past performance).

employment/income, which hinder their ability to participate effectively in the political process.[56]

The challenged district CD27 has the effect of diluting Nueces County Hispanic voters' electoral opportunity—that is in fact why the State chose to put those voters in an Anglo-majority district, to protect an incumbent who was not the candidate of choice of those Latino voters. Although Defendants assert that some people wanted Nueces County to anchor its own district, see docket no. 1272 at 127, the Court finds that the primary and dominant motive was to place the incumbent Farenthold, who lived in Nueces County and would likely be ousted by the existing Latino majority, into an Anglo-majority district (and thus to take away the opportunity to elect that Nueces County Latinos had enjoyed). *See, e.g.*, Downton 8-31-11 depo. (Joint Ex. J-62) at 49 ("Q. What was the purpose of including Nueces County in Congressional District 27 in the enacted plan? A. Congressman Farenthold lives in Nueces County. We were trying to draw him into a Republican district."); Seliger depo. (Joint Ex. J-59) at 25-26 (noting that joining

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[56] In Nueces County, the mean family income and the mean household income for Anglos is almost twice that of African Americans and Hispanics. MALC-149. Hispanics and African Americans are several times more likely to rely on food stamps. *Id.* The per capita income for Anglos is more than three times that of Hispanics and almost three times that of African Americans. *Id.* More than 86% of the Nueces County functionally illiterate persons over 25 are Hispanic. MALC-150. 16.3% of Hispanics over the age of 25 are functionally illiterate, compared to 2.6% of Anglos. *Id.* Almost one third of Hispanics over the age of 25 are not high school graduates, compared to 8.3% of Anglos. *Id.* 11.4% of Anglos over 25 have graduate or professional degrees, compared to 4% of Hispanics. *Id.*

Nueces County with counties to the north was to try to help Farenthold hold the district). As discussed previously, incumbency protection does not permit the dominant party to ignore § 2 or to dilute Latino voting power because the Latino voters would not favor the incumbent candidate.

Even if incumbency protection must be considered or weighted equally with § 2 obligations to avoid Equal Protection Clause issues (which the Court does not decide), Defendants failed to show that both considerations could not be accommodated in the plan. They never explored this option; they made the decision to place all of Nueces County in an Anglo district going to the north from the beginning of the process. TrA1772-73 (Downton) (directive to put Nueces County in a northern-oriented district was given "[f]rom the beginning of the process"). Several plans (*e.g.*, Plans C126, C164, C187, C225) demonstrate that the political goal of protecting Farenthold could be accommodated along with the § 2 rights of most Nueces County Hispanics, and the neighboring district(s) would not extend so far north. Numerous maps also demonstrated that accommodating the § 2 rights of all or most Nueces County Hispanic voters would not compromise the § 2 rights of any other voters, and in fact including it substantially accommodates the § 2 rights of Hispanic voters in South/West Texas.

Where the rights of voters who have demonstrated § 2 violations can be accommodated through the use of compact districts that do not subordinate traditional redistricting principles more than necessary to address the § 2 liability, those voters' § 2 rights must be accommodated. This is not a case in which Plaintiffs are

asserting that their districts are simply preferable, that the State did not get things "just right," or in which Nueces County Hispanics' § 2 rights could not be accommodated along with other voters with § 2 rights. *See Bush v. Vera*, 517 U.S. 952, 977-78 (1996) (noting that a § 2 district that is reasonably compact and regular, taking into account traditional districting principles, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless "beauty contests"); *LULAC*, 548 U.S. at 429 (the state may use one majority-minority district to compensate for the absence of another only when the racial group in each district has a § 2 right but they could not both be accommodated; if the inclusion of the plaintiffs would necessitate the exclusion of others, then the State cannot be faulted for its choice).

To the extent the desire for Nueces County to anchor a district did play a small role, that desire must yield to the requirements of the VRA, especially where, as here, Hispanic voters compose more than 50% of the County's CVAP (and that percentage is increasing) and the decision to remove Nueces County from its existing configuration led to other questionable race-based decisions, such as CD34 stretching from Cameron County all the way to Gonzales County and CD15 stretching from Hidalgo County to Guadalupe County in an effort to "pick up Anglo voters."[67] Accordingly, Plaintiffs have amply

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[67] *See* US-76 (Opiela email to Interiano noting that there was a "ripple effect" from putting Nueces County in a northern Anglo-majority district that would cause mapdrawers to create a South Texas district stretching far north to "pick up Anglo voters" to avoid a packing claim); TrA345 (Interiano) ("I believe that what we had discussed was that if Nueces County went north and you took that

demonstrated that Nueces County Hispanics have a § 2 right that has not been remedied in Plan C185, but could be remedied without the loss of a § 2 remedy for others (and without the Equal Protection Clause violation that exists in CD35 and potentially the South Texas districts in Plan C185).[58]

5. Summary

In sum, Plaintiffs have established a § 2 violation, both in terms of intent and effect, in South/West Texas. Plaintiffs have shown that seven compact majority-HCVAP districts could and should be drawn there that would substantially address the § 2 rights of Hispanic voters in South/West Texas, including Nueces County. Defendants' decision to place Nueces County Hispanic voters in an Anglo district had the effect and was intended to dilute their opportunity to elect their candidate of choice. Meanwhile, race predominated in the drawing of CD35, and Defendants' decision to place majority-HCVAP CD35 in Travis County was not to comply with the VRA but to minimize the number of Democrat

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population to a district going north . . . the concern was that any district south of that, there was a risk of it being considered packing.").

[58] The Court notes that, although its finding that CD35 violates the Equal Protection clause under a *Shaw*-type analysis is related to and supports Plaintiffs' § 2 claim in Nueces County, the claims are independent. The Task Force Plaintiffs support CD35 but still assert § 2 claims on behalf of Nueces County Hispanic voters. Therefore, even if the Rodriguez Plaintiffs are no longer pursuing a *Shaw*-type claim concerning CD35, the Court still concludes that Plaintiffs have demonstrated that the Nueces County Hispanics have established a § 2 violation insofar as they have shown that their § 2 rights could have been accommodated but were not.

districts in the plan overall. Plaintiffs have established an equal protection violation with regard to CD35. Defendants' manipulation of Latino voter turnout and cohesion in CD23 denied Latino voters equal opportunity and had the intent and effect of diluting Latino voter opportunity. Nueces County Hispanics and Hispanic voters in CD23 have proved their § 2 results and intentional vote dilution claims. The configurations of CD23, CD27, and CD35 in Plan C185 are therefore invalid.

II. Dallas-Fort Worth area

In the DFW area, Plaintiffs assert § 2 intentional vote dilution and results claims, Fourteenth Amendment racial discrimination claims, and Fourteenth Amendment *Shaw*-type racial gerrymandering claims. In support of their claims, Plaintiffs contend that the one existing African-American opportunity district (CD30) was unnecessarily and intentionally packed with minority voters and that the rest of the minority populations in Dallas and Tarrant Counties were intentionally fragmented ("cracked"). Plaintiffs assert that, had the Legislature not intentionally fragmented the minority population to avoid creating what it viewed as a district that would elect Democrats, there would "naturally" be additional minority opportunity districts in the area. Thus, a primary complaint is the Legislature's failure to create one or two new minority opportunity districts (either single-minority or coalition) in DFW, and its intentional avoidance of such districts. The Task Force plaintiffs also contend that, regardless of intent to help or hurt minorities, race predominated in the decision to include populations in districts throughout DFW, but

primarily in CD26 in Tarrant County and in CD6 in Dallas County, in violation of the *Shaw* line of cases on racial gerrymandering.

Defendants contend that politics, not race, was the metric used to draw lines in DFW, and although they concede that race was used to some degree in districts CD12 and CD26, Defendants contend that this use of race was not discriminatory and did not violate the Equal Protection Clause under a *Shaw*-type inquiry. With regard to the § 2 results claim, Defendants argue that the Hispanic population in DFW is not sufficiently geographically compact to create a § 2 Latino opportunity district because the HCVAP population is too small and too dispersed, and that it was not required to draw a coalition or other minority district, which would elect a Democrat.[59] And because no majority-minority district was required, Defendants contend, mapdrawers were free to engage in political gerrymandering that had the unsurprising and foreseeable (but not intended) effect of dividing minority communities.

The Court will begin its analysis with Plaintiffs' traditional § 2 results claims under *Gingles*. Because the Court finds that Plaintiffs' results claims regarding the failure to draw one additional minority coalition district are moot and that Plaintiffs have failed to provide sufficient evidence to support their other § 2 results

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[59] *See* TrA205-06 (opening arguments); proposed fact finding 644 (docket no. 1276) ("The Legislature viewed the creation of coalition districts as Democratic districts and they did not have the goal of creating additional Democratic congressional districts unless it was required to do so under the Voting Rights Act.").

claims at this time, it must consider the constitutional claims.[60]

A. Whether Plaintiffs can satisfy *Gingles* for an additional Latino opportunity district?

To satisfy the *Gingles* preconditions for a new Latino opportunity district in a traditional vote dilution results case, Plaintiffs must show that Latinos are "sufficiently large and geographically compact to constitute a majority in a single-member district," and all parties agree that a majority is greater than 50% HCVAP for a Latino opportunity district. *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009) (plurality); *Thornburg v. Gingles*; 478 U.S. 30, 50 (1986); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853 (5th Cir. 1999). Numerous maps were submitted to Downton and the Legislature for consideration during the session and as demonstration maps at trial, but Plaintiffs have failed to demonstrate that any contained a compact district that was majority-HCVAP.

1. Task Force Plan C190

The Latino Task Force has submitted Plan C190 (Joint Map Ex. J-11), which includes CD6, the only proposed HCVAP-majority district using 2005-2009 ACS data. Using that data, CD6 is 50.4% HCVAP (and 66.8% HVAP and 41.6% total SSVR). It joins Latino neighborhoods in the Fort Worth area with "several heavily Latino neighborhoods in the Dallas area, such as Oak Cliff and Grand Prairie, and the Latino populated

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[60] Even if the Court did find for Plaintiffs on the results claims, consideration of the intentional vote dilution claims would likely still be necessary given the request for bail-in relief.

areas of Irving and Farmers Branch." Docket no. 482 at 55 (Task Force proposed fact finding 304); *see also* docket no. 1274 at 152 (Task Force proposed fact finding 1003: "Congressional District 6 in plan C190 unites Latino communities in Dallas and Tarrant Counties."). The Task Force asserts that this district takes in "similar neighborhoods" and would elect the Latino-preferred candidate in seven of seven racially contested general elections. Docket no. 1282 at 10.

The Task Force proffered some exhibits that show that CD6 encompasses many areas with 10% or higher population age 18 years and over who speak Spanish and speak English "not well" or "not at all" (PL-360), high percentages of population age 25 and over with less than a high school diploma (PL-361), and mostly areas with low (below $38,000) median household income (PL-362). Task Force exhibit PL-363 also shows that the contours of the district closely track areas with high Hispanic population, including virtually all areas in Tarrant County with 80% or higher Hispanic population and most such areas in Dallas County. Thus, the Task Force Plaintiffs assert, CD6 unites Latino communities, communities with low educational attainment, and low-income communities in Dallas and Tarrant Counties. Docket no. 482 at 54 (proposed FF 300-302).

Alex Jimenez, a Task Force individual plaintiff from Tarrant County, testified that proposed CD6 joins people, businesses, and consumer bases in Fort Worth and Dallas that are fairly similar. Tr574-75. He testified that people in Fort Worth and Jefferson/Oak Cliff in Dallas are very similar. Tr575. He thinks voters in the district communities would support the same candidate based on what the candidate represents, not on whether the

candidate is Republican or Democrat. Tr576. The Task Force also offers the Declaration of Hector Flores, a Dallas County resident, who notes that CD6 "reflects several predominantly Latino neighborhoods in the Fort Worth area," "several heavily Latino neighborhoods in the Dallas areas, such as Oak Cliff and Grand Prairie," and "Latino populated areas of Irving and Farmers Branch." PL-415 at ¶ 20. He stated that the schools in those areas are largely Latino and have large ESL populations, that the streets and transportation infrastructure are uniformly poor, the housing is typically low-to-middle-class-income housing with substantial multifamily housing, the Latinos in the areas largely work in construction or run small businesses, and the Latinos who reside in the areas reflected in this proposed district have much in common culturally, linguistically, and economically. PL-415 at ¶¶ 21-24.

Defendants argue that the district is not reasonably compact as required by *Gingles* because of its low compactness scores, its convoluted shape, and its many fingers and extensions. Tr56; Docket no. 411 at 28; Docket no. 457 at 22. Defendants' compactness expert Todd Giberson noted that CD6 had the worst compactness scores of all proposed demonstration districts he analyzed. Joint Expert Ex. E-18 at 6. It has an area rubber band score of .303 and a perimeter-to-area score of .018, both of which reflect very low compactness.[61] Joint

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[61] As explained by the court in *Rodriguez v. Harris County, Texas*, 964 F. Supp. 2d 686, 740 (S.D. Tex. 2013), the area rubber band score measures the ratio of the area of the district to the area of the smallest convex polygon enclosing the district and symbolizes "how tightly packed or spread out the geography of a district is." "A long, narrow district, or one with 'fingers' or other extensions, is less

Map Ex. J-11. It is the only proposed district that is less compact using the area rubber band measurement than CD35 in the enacted plan, which is the least compact district in Plan C185. Giberson 2011 depo. (Joint Ex. J-42) at 40-41. However, using the area-to-smallest-circle measurement, CD6 is more compact than CD35 in Plan C185. *Id.*

To satisfy the first *Gingles* precondition, Plaintiffs must prove that their demonstration district contains a majority HCVAP and that the minority population in the district is "geographically compact." *Gingles*, 478 U.S. at 50. The § 2 compactness inquiry considers the compactness of the minority population, not the compactness of the contested district or necessarily the precise shape of its boundaries, though as discussed below the shape of the district is relevant. *LULAC v. Perry*, 548 U.S. 399, 433 (2006). In other words, the Court should focus on the size and concentration of the minority population. *Houston v. Lafayette Cty., Miss.*, 56 F.3d 606, 611 (5th Cir. 1995).

If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district, and a district that reaches out to grab small and apparently isolated minority communities is not reasonably compact. *Bush*, 517 U.S. at 979; *LULAC*, 548

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compact because it takes a large circle to enclose the entire district, yet much of that circle is empty." *Id.* Perimeter-to-area compares the relative length of the perimeter of a district to its area. *Id.*; *see also LULAC v. Perry*, 548 U.S. 399, 455 n.2 (2006). "Jagged district borders substantially lengthen the boundary without enclosing more area and hence score low." *Rodriguez*, 964 F. Supp. 2d at 741.

U.S. at 432. However, members of a racial group in different areas could share similar interests and therefore form a compact district "if the areas are in reasonably close proximity." *LULAC*, 548 U.S. at 435. "A district would not be sufficiently compact if it was so convoluted that there was no sense of community, that is, if its members and its representative could not easily tell who actually lived in the district." *Rodriguez v. Harris Cty., Tex.*, 964 F. Supp. 2d 686, 737-38 (S.D. Tex. 2013) (citing *Clark v. Calhoun Cty., Miss.*, 21 F.3d 92, 96 (5th Cir.1994) (noting that "[a] number of courts have concluded that the first *Gingles* precondition is not satisfied if the proposed district does not retain a natural sense of community such that it can be effectively represented")).

Further, the § 2 compactness inquiry must take into account traditional districting principles such as maintaining communities of interest and traditional boundaries. *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (citing *Bush v. Vera*, 517 U.S. 952, 977 (1996)); *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1391-92 (E.D. Wa. 2014) ("The compactness inquiry under § 2 . . . focuses more generally on whether the proposed minority district reasonably comports with 'traditional districting principles' such as contiguousness, population equality, maintaining communities of interest, respecting traditional boundaries, and providing protection to incumbents."). "The recognition of nonracial communities of interest reflects the principle that a State may not 'assum[e] from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *LULAC*, 548 U.S. at 433. Thus, to evaluate geographical compactness, the Court considers the dispersion of the relevant minority

population, the shape of the proposed district (as measured by a visual evaluation and by statistical measures of compactness), and the district's compliance with traditional redistricting principles (such as respect for communities of interest and traditional boundaries). *See Rodriguez*, 964 F. Supp. 2d at 737-54; *see also Vera v. Richards*, 861 F. Supp. 1304, 1341 (S.D. Tex. 1994) (noting that a district's compactness must be a relative measure based on location and population density and that "[i]n a major urban county, compactness makes little sense if considered in terms of geographic sprawl alone, but it seems far more probative when viewed in terms of a city's or county's neighborhoods, geopolitical subdivisions, and business location"), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996).

The Court agrees with Defendants that the proposed district indicates that the HCVAP population is not sufficiently geographically compact to satisfy the first *Gingles* precondition. The evidence shows that, although the Hispanic population in Dallas and Tarrant Counties has grown, neither county was above 25% HCVAP at the time of redistricting, and neither county contained sufficient HCVAP population to form the majority of a district solely within that county. *See, e.g.*, TrA1237-38 (Korbel); D-231. As a result, the proposed CD6 joins, by a long narrow strip, a significant portion of Fort Worth to various areas of Dallas and Dallas County. Although the western portion of the district is mostly populated by Fort Worth residents, it includes small portions of Haltom City, Sansom Park, Lake Worth, and River Oaks, and has several large tentacles rather than a compact shape. One who drove in a circle within Fort Worth could exit and enter the district ten or more times. This portion of the

district does not appear to have a natural sense of community.

As noted, CD6 then connects this Fort Worth-area population to other Latino population in Dallas County via a long, narrow strip no wider than a block or a highway at points. Once within Dallas County it takes only select portions of Grand Prairie, reaches north and juts into portions of Irving via highly irregular lines that do not appear to respect any traditional boundaries, then narrows and again employs bizarre shapes to take additional Irving population, Dallas population, as well as parts of Farmers Branch and Carrollton. Elsewhere, it narrows through central Dallas and then extends a long, jagged protrusion east throughout parts of Dallas and picks up part of Balch Springs. The district has very little integrity in terms of traditional boundaries or districting principles within Dallas County and does not appear to retain a natural sense of community.

Overall, the district shows no regard for traditional districting principles such as compactness or respecting county lines, towns, cities, or voting precincts. *See* docket no. 461-1 at 2 (Engstrom report) (noting that CD6 was drawn without regard to precinct boundaries). The Task Force asserts that the shape of CD6 "is not dictated solely by race at the expense of all other redistricting factors" and that DFW districts "are notoriously challenging to draw because of the existing African American opportunity district, CD30, and because of the demands of incumbents to protect their homes and district office locations." Docket no. 460 at 15. The Task Force argues that, for this reason, the State's plan "has very poor compactness scores in the Dallas-Fort Worth area" and "in light of the State's tolerance for less compact districts

in this region, and the lack of any evidence that Plaintiffs' CD6 follows boundaries other than communities of interest," the State cannot successfully challenge CD6 as noncompact. *Id.* However, it is Plaintiffs' burden to demonstrate compactness, especially in light of the district's visual non-compactness.[62] *Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 669 (5th Cir. 2009) ("plaintiffs bear the burden of proof in a VRA case, and any lack of record evidence on VRA violations is attributed to them"). Plaintiffs fail to demonstrate specifically how the cited factors play a role in the demonstration district's strange shape or that the district in general respects communities of interest and traditional boundaries.[63] The fact that the districts in Plan C185 may be noncompact due to various gerrymandering and incumbency factors does not demonstrate that CD6 is compact.

To be sure, the first *Gingles* precondition does not require some aesthetic ideal of compactness, but simply that the population be sufficiently compact to constitute a majority in a single-member district. *Houston v.*

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[62] *See Chen v. City of Houston*, 206 F.3d 502, 512 (5th Cir. 2000) ("[T]he district challenged in *Shaw* could be safely assumed not to have been driven by communities of interest, since it 'winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas' in an attempt to gather up 'enclaves ofblack neighborhoods' and 'even towns are divided.'") (quoting *Shaw v. Reno*, 509 U.S. 630, 635-36 (1993)).

[63] David Hanna testified that he was unable to draw a majority-HCVAP district that was more compact than a proposed district with "a lot of arms and tentacles" that may have been CD6, indicating that it is the dispersion of the HCVAP population and not other factors that cause its strange shape. TrA1576-77.

Lafayette Cty., Miss., 56 F.3d 606, 611 (5th Cir. 1995) (quoting *Clark v. Calhoun Cty., Miss.*, 21 F.3d 92, 95 (5th Cir. 1994)). But despite this directive and although Supreme Court precedent indicates that courts are to focus on the compactness of the minority community and not necessarily district borders when determining § 2 compactness, Justice O'Connor's plurality opinion in *Bush v. Vera* makes clear that "[d]istrict shape is not irrelevant." 517 U.S. 952, 980 (1996). Although her inquiry was whether the district at issue satisfied strict scrutiny, Justice O'Connor's plurality relied primarily on bizarre shape and noncompactness of district lines to conclude that the district was not compact and therefore not required by § 2.64[64]

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[64] The Court is mindful that the compactness inquiry under § 2 and the purpose inquiry under a Shaw-type equal protection claim are distinct. *Clark v. Calhoun Cty., Miss.*, 88 F.3d 1393, 1406-07 (5th Cir. 1996). As the Fifth Circuit noted, Plaintiffs typically attempt to show that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district by drawing hypothetical majority-minority districts; this is necessary to show that it is "the current districting scheme and not, for example, geographic dispersal that is the source of their disproportionately weak political strength." *Id.* at 1406. Thus, the *Shaw*-type claim's emphasis on purpose (specifically, whether race predominated and subordinated traditional redistricting principles) does not apply to the first *Gingles* precondition because "the first *Gingles* factor is an inquiry into causation that necessarily classifies voters by their race." *Id.* at 1406-07 (also noting that the Court has not suggested that a district drawn for predominantly racial reasons would necessarily fail the *Gingles* test). Accordingly, the Court does not accept Defendants' argument that CD6 must be rejected simply because it "would have likely raised a *Shaw* challenge" (proposed fact finding 647, docket no. 1276 at 70). In addition, the Court rejects the Task Force's argument that Defendants must show that the proposed district would violate

Justice O'Connor agreed with the district court's finding that the district had "no integrity in terms of traditional, neutral redistricting criteria." *Id.* at 960. She described the Dallas district at issue as having 50% of its population in a compact, albeit irregularly shaped, core in south Dallas, but "the remainder of the district consists of narrow and bizarrely shaped tentacles." *Id.* at 965 She wrote, "Over 98% of the district's population is within Dallas County, . . . but it crosses two county lines at its western and northern extremities. Its western excursion into Tarrant County grabs a small community that is 61.9% African-American; its northern excursion into Collin County occupies a hook-like shape mapping exactly on the only area in the southern half of that county with a combined African-American and Hispanic percentage population in excess of 50%." *Id.* The district court wrote,

> The district sprawls throughout Dallas County, deliberately excludes the wealthy white neighborhoods of Highland Park and University Park and extends fingers into Collin County, which include the outermost suburbs of Dallas. In Collin

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Shaw. *See* docket no. 460 at 15 ("Although the State contests the compactness of Plaintiffs' demonstration CD 6 in Plan C190, it fails to explain how the shape of CD 6 would be an unconstitutional racial gerrymander.").

Nevertheless, *Clark* re-iterates that *Gingles* "insists upon a compact district" to establish § 2 liability. *Clark*, 88 F.3d at 1407. Further, *Shaw*-type cases that discuss whether a district that has been drawn by a legislature satisfies strict scrutiny in terms of complying with § 2 of the VRA—specifically, whether the state had a strong basis in evidence for believing that the *Gingles* preconditions were satisfied—are relevant.

> County, the district picks up a small African-American neighborhood. The district extends into Tarrant County only to pick up a small border area with a high African-American concentration. It also reaches out to claim Hamilton Park, an affluent African-American neighborhood surrounded by whites. Part of the district runs along Trinity River bottom, using it to connect dispersed minority population. Numerous [voter tabulation districts] were split in order to achieve the population mix required for the district. . . . It is at least 25 miles wide and 30 miles long.

Id. at 965-66 Although she used these facts to determine that race predominated over traditional districting principles in drawing CD30, Justice O'Connor also relied on them to determine that the district was noncompact. It is difficult to distinguish the Task Force's proposed CD6 from CD30 in the *Bush* case, which Justice O'Connor's plurality concluded was not compact and not required by § 2.

Although the Task Force proffered some evidence showing that the population included in the proposed district shares a community of interest other than race, some such evidence was also introduced in *Bush* (citing evidence that the district "has a consistently urban

character and has common media sources throughout, and that its tentacles include several major transportation lines into the city of Dallas"), but that evidence was insufficient. *Id.* at 967.[65] While the population included in CD6 may have interests and characteristics in common other than race and one could generally say that urban Hispanics in Fort Worth and Dallas share similarities, that does not make them geographically compact, and Plaintiffs offer no explanation of why certain bizarrely shaped appendages are included, while nearby areas that could presumably form communities of interest are carefully excised. There is no evidence that specific lines, such as where the district reaches out and grabs a strangely shaped portion of the City of Irving and extends upward to take portions of Farmers Branch and Carrollton yet excises portions of Dallas, respect specific communities of interest such as neighborhoods (they certainly do not respect cities). Similarly, within Tarrant County and Fort Worth, there is no evidence to explain specifically what communities of interest are contained within the various appendages, other than that they are poor, relatively uneducated, and Latino. Nor is there evidence that the areas included in CD6 from various parts of Dallas County have more of a "community of interest" with those areas of Tarrant County to which

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[65]In addition, although CD12 in *Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899 (1996) was drawn to share communities of interest (the state wanted to place predominantly rural voters in one district and predominantly urban voters in another and ensure that incumbents would remain residents of their districts), the Court declared that "[n]o one looking at District 12 could reasonably suggest that the district contains a 'geographically compact' population of any race." *Id.* at 916.

they are joined than the areas immediately surrounding them but excluded from the district.

Thus, because of a lack of such evidence, the shape of the proposed district, and the other factors discussed above, the inescapable inference remains that the Hispanic citizen voting age population is not sufficiently compact and it is necessary to draw bizarre and convoluted lines to obtain enough population to reach the majority threshold. *See Fairley*, 584 F.3d at 669 ("Without sufficiently detailed evidence, a court is flatly unable to evaluate whether a possible redistricting scheme would establish legally adequate districts consistent with traditional districting principles such as compactness, contiguity, maintaining communities of interest, and respect for incumbency."); *see also Vera*, 861 F. Supp. at 1341 (rejecting argument that districts were sufficiently compact for *Shaw* purposes because they "include residents of similar socioeconomic background and lie fully within [one] county" because the districts were formed "in utter disregard for traditional redistricting criteria" and were "ultimately unexplainable on grounds other than the racial quotas established for those districts").

Further, CD6 is similar to the district rejected as noncompact in *Sensley v. Albritton*, 385 F.3d 591 (5th Cir. 2004). There, the district court rejected the plaintiffs' proposed 50.1% and 50.5% African-American voting age population districts because they failed to satisfy the geographical compactness requirement. Plaintiffs appealed, complaining that the court focused too much on district shape and "should have inquired more generally into whether the reconfigured district had 'take[n] into account traditional districting principles such as

maintaining communities of interest and traditional boundaries." *Id.* at 596.

The Fifth Circuit noted, "As the geographical shape of any proposed district necessarily directly relates to the geographical compactness and population dispersal of the minority community in question, it is clear that shape is a significant factor that courts can and must consider in a *Gingles* compactness inquiry." *Id.* In other words, the compactness inquiry "should not *hinge* on the shape of a district," but "the shape of a district certainly cannot be disregarded in a compactness inquiry." *Id.* (emphasis in original). The *Sensley* district was "an irregularly-drawn District 6 whose extended and distorted shape—resulting specifically from excluding non-blacks while simultaneously adding 'excess' blacks from other communities—constitutes strong evidence that the black minority populations contained therein are not 'reasonably compact.'" *Id.* at 597. Further, in order to connect African-American populations in two towns from two distinct communities ("which are separated by considerable distance (approximately 18 miles) and share few community interests"), the plaintiffs were required to ignore traditional districting principles such as maintaining communities of interest and traditional boundaries insofar as they split a town in half and disrupted existing electoral districts. For these reasons, the Fifth Circuit found that the district court's conclusion that plaintiffs failed to prove that the African-American population of Union Parish was sufficiently compact was not clearly erroneous. *Id.* at 598.[66]

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[66] *See also Gonzalez v. Harris Cty., Tex.*, 601 F. App'x 255, 258 (5th Cir. Feb. 9, 2015) (noting that *Gingles* compactness requires

Precedent thus indicates that if a proposed district is simply too bizarrely shaped *because* the minority population is dispersed in such a way that traditional districting criteria are barely considered, if at all, in drawing the district, it will be found to be non-compact for § 2 purposes. Like the districts in *Bush v. Vera* and *Sensley*, Plaintiffs' proposed CD6 has many tentacles and appendages. It shows no regard for traditional districting principles such as respecting counties, towns, cities, or voting precincts. It spans 60 miles and connects Hispanic populations in Dallas and Fort Worth by a long narrow corridor along the highway. Although there is evidence that the persons included do share some commonalities, it appears that the Latino citizen age voters are simply too dispersed to form the majority in a compact district, and Plaintiffs have failed to satisfy the first *Gingles* precondition for the creation of a new Latino opportunity district in the DFW area through proposed CD6.[67]

2. Use of 2008-2012 ACS data for certain proposed districts

Certain Plaintiffs contend that, given the lagging nature of the ACS data and the fact that it underestimated the Hispanic and African-American CVAP in Dallas and

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accounting for traditional districting principles such as maintaining communities of interest and traditional boundaries, and affirming district court's rejection of geographically compact hypothetical HCVAP-majority district because it did not respect traditional districting principles).

[67] Nothing in this ruling precludes Plaintiffs who have pleaded such a claim from pursuing their § 2 results claims based on the failure to draw an additional Latino opportunity district in DFW in Plan C235.

Tarrant Counties,[68] some proposed districts in DFW that were below 50% HCVAP using 2005-2009 ACS data actually exceeded the 50% threshold at the time of redistricting. Although the Court finds that the 2008-2012 ACS data, which the experts generally agree more accurately reflects the population in 2010 than the 2005-2009 ACS data used by the Legislature, is relevant to Plaintiffs' results claims against Plan C185,[69] Plaintiffs have failed to demonstrate with that data that any of those proposed districts would have exceeded 50% HCVAP in 2010 or 2011.

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[68] As discussed in the fact findings, the Court agrees that the 2005-2009 ACS data was lagging insofar as it more accurately represented the population in 2007 than 2010 and that it underestimated the minority CVAP.

[69] Even counsel for Defendants acknowledged that, for § 2 results claims, "there's an argument that [the 2008-2012 ACS data] is a much more accurate picture of what the facts on the ground were in 2010." TrA2123. The court in *Rodriguez v. Harris County, Tex.*, 964 F. Supp. 2d 686, 732-33 (S.D. Tex. 2013), *aff'd sub nom. Gonzalez v. Harris County, Tex.*, 601 F. App'x 255 (5th Cir. Feb. 9, 2015), allowed the plaintiffs to support their § 2 claims with 2006-2010 ACS figures even though the 2005-2009 ACS data was the only publicly available data at the time the plan at issue was adopted in August 2011. The Court agrees with that court's conclusion that more recent ACS 5-year surveys can be considered in evaluating the HCVAP of proposed *Gingles* districts in § 2 results claims. In fact, the Court finds that the 2008-2012 ACS data would best reflect the CVAP data corresponding to 2010, and would be the preferable data for evaluating § 2 results claims concerning the 2011 redistricting maps. Even though this data was not available to the Legislature at the time of redistricting, a § 2 results claim determines only whether the district lines result in minority vote dilution, and is not dependent on what the Legislature knew or intended at the time of redistricting.

For example, CD34 in Veasey's Fair Texas Plan C121 was 45.6% HCVAP using 2005-2009 ACS data, but increased to only 47.4% using 2008-2012 ACS data. Joint Map Ex. J-2; D-545.6. CD35 in MALDEF's Plan C122 was 45% HCVAP using 2005-2009 ACS data, but increased to only 45.9% using 2008-2012 ACS data. Joint Map Ex. J-3; D-546.6. CD35 in Plan C166 was 45.6% HCVAP using 2005-2009 ACS data, but increased to only 47.4% using 2008-2012 ACS data.[70] Joint Map Ex. J-7; D-565.5. CD35 in Plan C193 was 44.6% using 2005-2009 ACS data, and increased to only 45.8% using 2008-2012 ACS data.[71] Joint Map Ex. J-14; D-571.6. Although the Court finds that the 2005-2009 ACS data did underestimate the HCVAP population in 2010/2011, it does not appear to have done so as drastically as Plaintiffs anticipated. Thus, even using the 2008-2012 ACS data to analyze the districts, Plaintiffs do not reach the 50% HCVAP threshold.

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[70] In their 2011 post-trial briefing, the Rodriguez Plaintiffs urged the Court to credit Dr. Ansolabahere's testimony and rebuttal report, which sought to compensate for the 2005-2009 ACS data lag. Docket no. 424 at 9-10. Dr. Ansolabahere testified that he believed CD35 in Plan C166 exceeded 50% HCVAP at the time of redistricting. The 2008-2012 ACS data have not borne that out, however, and Plaintiffs have not offered a convincing argument for relying on Dr. Ansolabahere's testimony over the 2008-2012 ACS data.

[71] LULAC submitted Plan C195 with CD33 that expert witness George Korbel "designed" to be majority-HCVAP. Joint Map Ex. J-16. As he notes, it is a very "stressed" district and reaches only 47.5% HCVAP using 2005-2009 ACS data. Tr691. Korbel opined that the district likely exceeded 50% HCVAP using more current data, but LULAC did not provide the 2008-2012 ACS data to show whether this was true. Given that the HCVAP in other plans did not increase by more than 2%, the Court finds that CD33 in Plan C195 was likely not majority-HCVAP at the time of redistricting.

3. NAACP Plan C193 and use of post-enactment population projections

The NAACP asserts that this Court should rely on post-enactment population data to determine whether the *Gingles* numerosity condition is satisfied. As noted, the NAACP submitted Plan C193, which included CD35 that was not HCVAP-majority based on 2005-2009 ACS data (it was 44.6%) or 2008-2012 ACS data (it was 45.8 (+/-.9)%), but that Dr. Fairfax testified became HCVAP-majority sometime between 2012 and 2013. TrA805-06 (Fairfax) (testifying that the projected HCVAP was 50.48% in 2013 and 51.92% in 2014).

NAACP Plaintiffs rely on two Fifth Circuit cases to support their use of post-enactment population data. In *Westwego Citizens for Better Government v. City of Westwego*, 906 F.2d 1042 (5th Cir. 1990), the plaintiffs filed suit in 1985, challenging the at-large election of city aldermen and proposed two plans, both of which would create one district in which black residents would be a majority. Trial was initially postponed pending the Supreme Court's decision in *Gingles*, and then after a bench trial the court dismissed the case based on oral rulings. The Fifth Circuit remanded after the first appeal, directing the district court to make specific findings of fact and conclusions of law. *Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201 (5th Cir. 1989) ("*Westwego I*"). In a footnote, the Court noted that the record was "unclear" whether there would in fact be a black majority of voting age population in a single district under the plaintiffs' proposed plan, and the district court was directed to make this determination on remand. *Id.* at 1205 n.4.

On remand, the district court issued supplemental findings, including that "there was no evidence in the record to support the conclusion that blacks would constitute a majority of the voting age population in any proposed single-member district." *Westwego II*, 906 F.2d at 1043. The district court also rejected a finding of racially polarized voting and entered judgment. The plaintiffs then filed a motion asking the district court to amend its findings to take into account developments in the two years since the case was originally tried, specifically a March 1989 election that, for the first time, involved a black candidate. *Id.* The plaintiffs also included "black voter registration data and data from the 1989 election." *Id.*

On the second appeal, the Fifth Circuit held that "given the long term nature and extreme costs necessarily associated with voting rights cases, it is appropriate to take into account elections occurring subsequent to trial" to determine the presence of racially polarized voting. *Id.* at 1045 (footnote omitted). This was especially true in that case, given that no elections prior to trial involved an African-American candidate, such that the post-trial election was "highly relevant." *Id.*

Regarding the population, the Fifth Circuit faulted the district court for failing to take new evidence that the BVAP was sufficient in size, instead determining based on the old record that there was no evidence "that blacks would constitute a majority of the voting age population." *Id.* at 1046. The Court noted that the proffer "would have allegedly proved that blacks constituted a majority of the voting age population in certain hypothetical districts," and included evidence as to the number of registered black voters in the hypothetical districts, evidence that

the black candidate in the March 1989 election received 52% of the vote in those districts, and an affidavit that an agency could provide BVAP data for the districts. Id. The Fifth Circuit noted that minority voting age population data, minority voter registration data, and evidence of success by minority-preferred candidates is relevant to the first *Gingles* factor, specifically to establish potential to elect. *Id.* The Court stated, "[b]ecause of frequent difficulties of proof and in light of the fact that vote dilution cases often become 'prohibitively expensive,' the [Supreme] Court espoused a 'flexible, fact intensive test.'" *Id.* The Court cited *Citizens for a Better Gretna v. City of Gretna, La.*, 834 F.2d 496, 502 (5th Cir. 1987) for the proposition that "*Gingles* 'suggests flexibility in the face of sparse data.'" The Fifth Circuit remanded a second time, stating that plaintiffs would "have the opportunity to adduce the evidence referred to in their motion." *Westwego*, 906 F.2d at 1047.

On remand, plaintiffs proposed one of their original plans but used 1990 census data to show it would be majority BVAP, and also proposed a variation on that plan "drawn to account for population changes between 1980 and 1990." *Westwego Citizens for Better Gov't v. City of Westwego ("Westwego III")*, 946 F.2d 1109, 1113 (5th Cir. 1991). The district court found that the original plan was "acceptable." *Id.* On the third appeal, the plaintiffs prevailed.

Plaintiffs also cite *Valdespino v. Alamo Heights ISD*, 168 F.3d 848 (5th Cir. 1999), in which the issue was whether the defendant could present 1997 non-census data to override the plaintiffs' 1990 census data, such that the plaintiffs' hypothetical HCVAP-majority district was no longer HCVAP-majority at trial. The Court noted that

Westwego "opened the door to the use of non-census data when census data are not sufficiently probative of the voting-age proportion of a population" and that its decision in *Perez v. Pasadena Independent School District*, 165 F.3d 368 (5th Cir. 1999) affirmed a district court's decision that the plaintiffs' population projections were too unreliable to overcome 1990 census data. *Id.* at 854. The Fifth Circuit held that the district court properly placed the burden on the Plaintiffs to prove a majority of Hispanics among voting-age citizens in their demonstration district at trial, and the defendant presented sufficient evidence to prove demographic changes since the census that showed there was no majority. *Id.* at 856. Citing other cases, the district court had noted that the court was not confined to census data, and that census data could be overcome by thoroughly documented and accurate proof of changed figures.

These cases support NAACP's position that, when appropriate, parties may use non-census data, if shown reliable, to prove that the CVAP is sufficiently changed from prior census data or data used at redistricting to either prove or disprove § 2 liability. By analogy, plaintiffs could potentially use data such as projections, if shown reliable, to prove that the CVAP is sufficiently changed from the ACS data used at redistricting to prove § 2 liability. However, the Court need not decide this issue because it finds it inappropriate to consider Fairfax's projections in the 2011 plan case given the facts of this case.

In *Westwego*, the post-enactment evidence was considered to clarify an ambiguity, whereas here there is no such ambiguity—the ACS data show that the district was not majority HCVAP in 2010, and Fairfax agrees it

was not HCVAP-majority at the time of redistricting. In *Valdespino*, the lawsuit was not filed until 1995 and trial was held in 1997, many years after the 1990 census data that plaintiffs were relying on for their case, such that it was appropriate for the court to consider whether liability was established using more current demographic data.[72] Here, in contrast, Plan C185 was enacted in 2011, but a new plan was enacted in 2013. There is no ambiguity or significant lapse of time that would warrant consideration of 2012 or later projections to evaluate the 2011 plan. Reliable demographic data concerning the population in 2012/2013 may be relevant to Plaintiffs' § 2 claims against the plan enacted in 2013, Plan C235, but not Plaintiffs' claims against the 2011 plan. Accordingly, the Court finds that the NAACP Plaintiffs failed to establish that their proposed district satisfied the numerosity requirement in 2011, though they are not precluded from raising this same argument and plan in the 2013 plan trial phase with regard to Plan C235.

B. Whether Plaintiffs can satisfy Gingles for a coalition district in DFW?

A number of maps were submitted to the Legislature during redistricting that would have created coalition districts in the DFW area, but the mapdrawers refused to draw such districts because they did not feel they were required by the VRA. In fact, mapdrawers were hostile to the creation or existence of minority coalition districts

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[72] The situation in *Johnson v. DeSoto County Board of Commissioners*, 204 F.3d 1335 (11th Cir. 2000), another case cited by the NAACP Plaintiffs, was similar. The court found it proper to consider non-census data to determine whether the 1990 census data accurately described the county population at trial in 1998.

because they viewed them as Democrat districts. *See, e.g.*, TrA277; TrA287 (Seliger) (minority districts were "without question" thought of as Democrat districts and Republican leaders thought maps with proposed districts "were just designed simply for Democratic seats"); TrA1600 (Downton) (stating that the map had to be 3-1 and that the Legislature would not vote for a district unless it was a Republican district).[73] As discussed in the Conclusions of Law, however, this Court finds that coalition districts may be required by § 2, so long as Plaintiffs satisfy *Gingles* with regard to the coalition. The Court thus turns to that inquiry.

As noted, to satisfy the first *Gingles* precondition, plaintiffs generally must proffer a demonstration district with a geographically compact minority population that exceeds 50% of the CVAP of the district. Plaintiffs have

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[73] At the June 2 HRC hearing when Solomons laid out Plan C125, he characterized CD6 as a "coalition district" (D-601 at 10), but there is no indication that any of the mapdrawers actually believed this to be true. Rather, as with Solomons' statements about CD23, this statement was made to create an appearance that mapdrawers were drawing new minority districts or were recognizing minority growth, when in fact they were not, and they knew they were not. The Red-100 Report shows that CD6 was 11.4% BVAP and 39% HVAP, and 50.1% B+HVAP. Thus, it had a bare majority of minority VAP, but it also had an Anglo CVAP of 59.5%. D-548. Therefore, it was not a majority-minority CVAP district. It was inconsistent for Solomons to assert that CD6 was a coalition district based on VAP when he and the mapdrawers had insisted on using CVAP to determine whether a district was a required VRA district. In addition, mapdrawers knew this district would not perform for minorities, and given their adherence to a 3-1 map policy, admittedly would not have drawn it to perform for minorities because they felt that would have made it a Democrat district.

proffered a number of plans with coalition districts that exceed 50% minority CVAP when Hispanic and African-American CVAP are combined. Some demonstration plans include one additional minority coalition district compared to Plan C185, but most include two additional minority coalition districts (in addition to benchmark CD30). In addition to arguing that coalition districts are never required, Defendants attack these plans as creating non-compact districts and for lacking the required minority cohesion.

The Court finds that Plaintiffs' § 2 results claims concerning the failure to draw one additional coalition district are moot, given that Plan C235 contains such a district and no additional bail-in relief could be granted even if Plaintiffs were to prevail on this claim. With regard to the results claims based on the failure to draw two additional districts, the Court finds that Plaintiffs fail to offer sufficient evidence to satisfy the first *Gingles* requirement of compactness.

1. Plan C121

Veasey's Fair Texas Plan C121[74] includes two coalition districts spanning Dallas and Tarrant Counties, in addition to maintaining CD30 entirely within Dallas County (with a 2005-2009 ACS combined BCVAP of 45.6% and B+HCVAP over 50%). Joint Map Ex. J-2. The Quesada Plaintiffs offer this plan, asserting that CD34

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[74] Plan C121 was offered during the 2011 legislative session and, according to then-Representative Marc Veasey, was drawn to more accurately reflect partisan balance in the state between Republicans and Democrats, in line with the partisan fairness arguments that Republicans used to justify the mid-decade redistricting in 2003. Veasey depo. (Joint Ex. J-55) at 70-72.

would be a new Hispanic district (with 45.6% HCVAP and 16.5% Black alone CVAP using 2005-2009 ACS data) and CD35 would be a new African-American opportunity district (with 35.6% Black alone CVAP and 15.2% HCVAP using 2005-2009 ACS data).[75]

The Quesada Plaintiffs state that CD34 "would be based in the traditional and growing Hispanic neighborhoods in the North Oak Cliff, East Dallas, Pleasant Grove and Grand Prairie neighborhoods in Dallas County and extend west to include growing Hispanic neighborhoods in east Arlington as well as Fort Worth's north side and south side Hispanic neighborhoods." Docket no. 409 at 15. Veasey testified that CD34 "keeps communities of interest together" and was more "coherent" compared to CD26 in Plan C185. Veasey depo. (Ex. J-55) at 67.

The Quesada Plaintiffs state that CD35 "would be based in the large and growing African-American neighborhoods in southeast, southwest, and east Fort Worth" and "would extend east through growing minority neighborhoods in Arlington and into Dallas County to include African-American neighborhoods in the southwest Dallas County cities of Cedar Hill and DeSoto."

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[75] Using 2008-2012 ACS data, these districts remained majority B+HCVAP and although both Black alone and HCVAP increased in both districts, neither district exceeded 50% for a single minority group. D-545.6. The Quesada Plaintiffs also offer Plan C192, which would "retain District 30 as a Dallas-based African-American opportunity district" and create CD34 (a new Hispanic opportunity district) and CD35 (a new African-American opportunity district). Docket no. 409 at 17. These districts are identical to those in Plan C121 and thus are not separately analyzed. The Quesada Plaintiffs also offer Plan C202, which is discussed below.

Docket no. 409 at 15-16. Meanwhile, they say, existing African-American opportunity district CD30 would "retain its core South Oak Cliff and South Dallas neighborhoods but would extend north to include the growing African-American neighborhoods along the east and north Interstate Highway 635 corridors." Docket no. 409 at 15.

Veasey testified that Plan C121 was drawn to comply with the VRA in terms of using race and so that African-American and Latino voters would have additional opportunities to elect. Veasey depo. (Joint Ex. J-55) at 80-81. When asked if race was considered in drawing the DFW districts, Veasey stated that he followed the Constitution and the VRA with regard to race and further stated, "I would say that the communities of interest, and those communities of interest happen to be communities that were mainly Hispanic, were taken into consideration when drawing this map." *Id.* at 80-81, 83. When asked what the other considerations were, he stated "that would be the biggest one" but also whether they would be able to work together and whether people in the district would have their voices heard. *Id.* at 83-84.

Ed Martin, one of the primary mapdrawers of Plan C121, testified that Congresswoman Johnson approved her district (CD30) in Plan C121 and thought it would be effective, that CD34 would be an effective Latino district, and that CD35 would be an effective African-American district similar to CD9 in Houston. Martin depo. (Joint Ex. J-48) at 120-21. He testified that CD34 was "drawn to provide electoral opportunity for 1.4 million Latino voters in the region." *Id.* at 122.

Dr. Lichtman analyzed Plan C121, and he testified that CD34 and CD35 in DFW would provide effective

opportunity for the minorities in those districts (the minority-preferred candidate prevailed in all five reconstituted statewide elections studied, and usually by a wide margin). Tr1240-41; Joint Expert Ex. E-3 at 20-22, Table 12. He concluded that CD34 would be an effective voting age single race Latino district (66.2% HVAP) and CD35 an effective voting age majority-minority district (59.5% B+HVAP). Joint Expert Ex. E-3 at 20, Table 11. Dr. Lichtman testified that he believed these districts were required by the VRA. Tr1259.

From a visual perspective, all three districts look somewhat bizarre, especially CD34. Although the Quesada Plaintiffs assert that proposed CD34 and CD35 are "reasonably compact," they fail to support this assertion. Docket no. 409 at 17. Defendants' compactness expert Todd Giberson noted that CD34 was similar to CD6 in Plan C190 and that it was not very compact. Joint Expert Ex. E-18 at 5-6. CD34 has an area rubber band score of .331 and a perimeter-to-area score of .043, both of which reflect low compactness. Joint Map Ex. J-2. Giberson did acknowledge that Texans view Dallas and Fort Worth as a unit—the "metroplex." Giberson depo. (Joint Ex. J-42) at 69. Although he testified that a district could connect two separate and distinct minority populations and still be compact (such as a referenced "earmuff" district in Illinois), he thought that CD34 (like CD6 in Plan C190) went to greater lengths to connect small pockets in both Dallas and Fort Worth and that the boundary was more convoluted than other districts he believed to be compact. *Id.* at 68-70.

Plaintiffs have not sufficiently proven that the proposed districts are compact for § 2 purposes insofar as

they have not shown that the districts (and the minority populations therein) are compact taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries. *See Rodriguez v. Harris Cty., Tex.*, 964 F. Supp. 2d 686, 738 (S.D. Tex. 2013) (noting that plaintiffs' demonstration maps satisfied the numerosity requirement but failed to present evidence explaining or permitting the court to understand to what extent the maps comported with traditional districting principles such that plaintiffs failed to establish the first *Gingles* precondition), *aff'd sub nom Gonzalez v. Harris Cty., Tex.*, 601 F. App'x 255 (5th Cir. Feb. 9, 2015).[76] Even if CD35 could be considered

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[76] In *Gonzalez*, the Fifth Circuit indicated that the Supreme Court's directive in *Easley v. Cromartie* that "the party attacking the . . . boundaries [drawn by the political subdivision] must show at the least that [it] could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" would be part of the plaintiff's burden under the *Gingles* first precondition in a § 2 results case. *Gonzalez*, 601 F. App'x at 259 (citing *Easley v. Cromartie*, 532 U.S. 234, 258 (2001)). However, *Easley v. Cromartie* is not a § 2 case—in that case, the plaintiffs asserted a *Shaw*-type racial gerrymandering claim against North Carolina's CD12, with plaintiffs arguing that the district was drawn predominantly on the basis of race and defendants arguing that the district was drawn on the basis of politics. The Supreme Court held that, in trying to prove that the district was drawn on the basis of race rather than the basis of politics, when the voting population is one in which race and political affiliation are highly correlated, plaintiffs must show that the legislature could have achieved its legitimate political goals in alternative ways comparably consistent with traditional redistricting principles and that would have brought about significantly greater racial balance. *See Alabama LBC v. Alabama*, 135 S. Ct. 1257, 1267 (2015) (noting that *Easley v. Cromartie* explains the plaintiff's burden in racial gerrymandering

compact, CD34 suffers from the same problems and lack of evidence as the Task Force's proposed CD6 in Plan C190. Conclusory assertions that the districts join "communities of interest" are insufficient, especially when the district is convoluted in shape and does not appear to respect traditional boundaries and communities of interest such as cities and voting precincts. Thus, Quesada Plaintiffs' proposal C121 fails to demonstrate that two additional compact minority districts could be drawn in DFW taking into account traditional redistricting principles and communities of interest.

2. Plan C163 & Plan C164

MALC offered demonstration plans C163 and C164 as creating two additional opportunity districts in DFW. Tr93-94 (Martinez-Fischer). Dr. Arrington found that Plan C163 overall "satisfied traditional redistricting principles" at least as well as the enacted plan. TrA410-11. However, this plan still split 447 precincts (Plan C185 split 518). US-352 at 54. He found that the overall compactness score (as measured by the mean Polsby-Popper score) was roughly similar to the enacted plan. TrA433; US-352 at 54. He opined that Plan C163 did "a

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cases in which the State argues that politics, not race, was its predominant motive). This Court fails to see how this requirement would apply to the plaintiffs' burden under § 2 to demonstrate that the minority population is sufficiently geographically compact to constitute the majority in a district, taking into account traditional redistricting principles. In a § 2 results claim, there is no question of discerning political from racial motive in the drawing of a demonstration district—as the Fifth Circuit recognized in *Clark v. Calhoun County* (and as discussed *supra* n.59), demonstration districts are necessarily drawn using racial criteria.

better job . . . in respecting the integrity of Dallas and Tarrant County." US-352 (Arrington Decl.) at 54.

CD5 in Plan C163 and Plan C164 is a convoluted butterfly shape that is almost entirely within Dallas County except for a small protrusion into Tarrant County that picks up 148 persons who are 86.5% Hispanic and African-American. Joint Map Ex. J-5 & J-6. It splits Grand Prairie, Irving, Farmers Branch, Carrollton, Mesquite, and Balch Springs. Giberson noted that "the convoluted boundaries stand out, as does the wispy, narrowly connected protrusion to the east." Joint Expert Ex. E-18 at 6. At his deposition, Giberson stated that CD5 was "borderline" to him. Giberson depo. (Joint Ex. J-42) at 77. He felt that the "wispiness" and "the connectivity of some of the area through such a narrow point" (specifically one large mass and two smaller masses "connected via some very small point") were problems. *Id.* at 78; *see also id.* at 79 ("I didn't like it on compactness because of the appendages that were there."). Again, this district does not appear to respect traditional boundaries and communities of interest, and Plaintiffs have failed to offer sufficient evidence to show that the population is sufficiently geographically compact taking into account such principles. The evidence concerning proposed CD12 in Plan 164 (which is almost identical to CD35 in Plan C163), which spans Dallas and Tarrant Counties, and CD30, which includes parts of Dallas and splits Duncanville, Balch Springs, Mesquite, and Garland, is similarly deficient.

3. Plan C193

The NAACP and the African-American Congressperson Plaintiffs offer Plan C193,[77] which the NAACP contends maintains "the effectiveness and integrity" of CD30 (as an African-American district) while adding a proposed new coalition African-American opportunity district (CD34) and a new coalition Latino opportunity district (CD35). Tr2077-78 (Ms. Riggs); *see also* docket no. 406 at 20-29; Joint Map Ex. J-14. CD30 has 49.6% BCVAP and 14.1% HCVAP using 2005-2009 ACS data. CD30 is 51.9% BCVAP using 2008-2012 ACS data. D-571.6. Proposed CD34 is majority-minority CVAP, but the B+HCVAP (32.4% + 15.8%) is less than 50% using 2005-2009 ACS data.[78] The H+BCVAP of CD34 is 52.9% using 2008-2012 ACS data. D-571.6. Proposed CD35 is over 50% B+HCVAP using either 2005-2009 or 2008-2012 ACS data.

Dr. Murray opined that Plan C193 "corrects the glaring failures in 2003 and 2011 to recognize the tremendous minority population growth in the area" and would create three effective minority opportunity districts there. Joint Expert Ex. E-4 at 36-37; Tr1035 (noting that CD34 and CD35 would be effective districts for minority voters). He stated that C193 creates a "more compact" CD30, does not undermine its long-term

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[77] The three DFW districts in Plan C193 are the same as in Plan C201 (also known as the "SCSJ July 5 Plan"). Plan C193 is a 7-district plan, and Plan C201 is a 14-district plan. They also resemble the districts in Plan C121, proposed by the Quesada Plaintiffs.

[78] In 2011, this district was proposed as an African-American, Latino, and Asian-American coalition district that would perform as an African-American opportunity district. Docket no. 406 at 27-28.

viability as an African-American district, and restores economic engines and communities of interest. Joint Expert Ex. E-4 at 37. He fails to explain how the NAACP's CD30 is more compact than the CD30 in Plan C185. Murray also opined that "[t]he heavily black and Hispanic neighborhoods in the Dallas/Fort Worth area were fairly close together in 2000. Since then, the combination of out-migration of Anglos and the rapid growth of mixed neighborhoods . . . has consolidated a broad swath of territory in over half of Dallas County and a third of Tarrant County that provides ample population for three compact minority opportunity districts" such that it is now "easier . . . to draw three minority opportunity districts in Dallas and Tarrant Counties in 2011 than was the case in [Houston] in 2003 when three such districts were produced." Murray report (Joint Expert Ex. E-4) at 32-33. However, Murray fails to offer any support for his assertions that these districts are compact, and visually, they are bizarrely shaped and non-compact.

The NAACP's expert Anthony Fairfax prepared a 2011 report (docket no. 267[79]) evaluating these districts (in the SCSJ July 5 Plan). Fairfax concluded that "the districts included in the Congressional SCSJ July 5 plan [including districts 30, 34, and 35] met traditional redistricting criteria and could be adopted in whole or in part by the state legislature." Docket no. 267-2 at 10; Docket no. 267-1 at 7; Tr834, Tr838-39, TrA793. The traditional redistricting criteria he evaluated were

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[79] Fairfax's report was submitted at trial as Joint Expert Ex. E-13. However, a corrected report and a supplemental report were filed on August 30, 2011 at docket no. 267.

demographic information (this appears limited to the district's VAP status), equal population, contiguity, county splits, and compactness.

Fairfax found that all districts in the plan were within the minimum and maximum compactness measurements (using Reock compactness measurements) of the enacted Plan C185. TrA794. Using the Schwartzberg and Polsby-Popper measurements, all districts were within the range except for proposed CD35. Fairfax depo. (Joint Ex. J-45) at 25-26; docket no. 267-1 at 4. Fairfax noted that it was not outside the compactness range of C185 by much, and he felt that CD35 was still within the acceptable range and would not raise *Shaw* problems in terms of compactness. Fairfax depo. (Joint Ex. J-45) at 38, 37; Tr795. Fairfax stated that CD35 was more compact than the district invalidated in *Shaw v. Reno* and was "not that much different" from other districts he had seen "around the country." *Id.* at 29. However, Fairfax did not know why the district was drawn in its particular configuration. *Id.* at 29-30. And he also noted that there may be other factors that determine whether a district violates *Shaw v. Reno* besides compactness scores. *Id.* at 37-38. Nevertheless, Fairfax provided his expert opinion at the August trial that CD34 and CD35 in Plan C193 are "compact enough to avoid *Shaw* problems." TrA795.

Congresswoman Johnson testified that CD34 and CD35would be effective districts in terms of the voters therein voting cohesively and electing a candidate of choice. Tr1291-92. When asked about C193 in terms of "the handling of the African American and Latino growth in the Dallas and Tarrant County areas," Congresswoman Johnson stated, "they get representation because they're placed together. They have common desires, common

economics. And the important issues to them are the same. And a map like this, they get representation so they can elect a person of their choice." TrA691. She testified that a "major purpose" behind drawing the three districts (CD30, CD34, and CD35) was "to give an opportunity for those concentrated minorities to elect a candidate of their choice." Tr1304. She stated that there are communities of interest beyond race that were part of the creation of CD34 and CD35 (though she stated it was primarily race). Tr1311. On follow up, she agreed that the districts contained communities of interest that have concerns about education and employment, criminal justice and "issues of that nature." Tr1312. She also testified that there were non-racial components to the district such as public television, public radio areas, and there was a major community coalition there with people with "very like desires." *Id.*

Franklin Moss, a resident of Tarrant County, testified that proposed CD34 "pulls together most of the . . . black areas on the Fort Worth Side of it" and "also takes under consideration, we call kind of the I-20 corridor of cities that are – that are right now majority African American. And that's Cedar Hill, Duncanville, DeSoto, Lancaster. So it pulls those areas together." TrA1185. He stated that those areas share "a lot of commonalities," but the only explanation of that statement was that "it sits on . . . that I-20 corridor, which even runs into Fort Worth. So it gives us an opportunity to pretty much be assured that we would elect a black candidate from that particular area." *Id.* He testified that African-American and Latino voters in Tarrant County share common concerns and interests, and that they shared interests concerning economic development, housing (specifically rebuilding

communities), health, and employment issues. TrA1180. Congresswoman Johnson testified that new CD34 took a large concentration of African-American population from CD30 but because of the growth in certain areas of proposed CD30, CD30 would be maintained as an African-American coalition district. Tr1293-94. She acknowledged the CD34 was minority Anglo in terms of voting age population, and stated that was significant because the African Americans and Latinos have mutual issues and live in a concentrated area together. Tr1294. She also felt the Asian voters would act in coalition with African-American and Latino voters. *Id.* The NAACP asserts that CD34 "is [a] naturally-occurring minority opportunity district that captures high growth communities of interest in the DFW region" and that "CD34 encompasses a community of interest—the growing African American population along the I-20 corridor." Docket no. 1280 at 39; docket no. 1281 at 35 (proposed FF 190); docket no. 1232 at 13; TrA1980 (Riggs closing argument) ("We heard testimony from Franklin Moss about the community of interest that exists along the I-20 corridor in the southern parts of Tarrant County and Dallas County, and this is where that district [CD34] is drawn to encompass that naturally occurring population growth."). The NAACP also asserts that "CD34 is a compact district, well within the norms of the compactness of the enacted districts." Docket no. 1281 at 34 (proposed FF 189). It has an area rubber band score of .600 and a perimeter to area score of .089. Joint Map Ex. J-14.

The NAACP states that "CD35 is a reasonably compact district that encompasses a compact minority population. It is only in two counties, and all within one urban region." Docket no. 1232 at 14; docket no. 1280 at

42; docket no. 1281 at 35 (proposed FF 192). Congresswoman Johnson testified that it would be appropriate to consider African-Americans and Latinos as a group for the creation of CD35 and it would be a good coalition "because we all vote together now." Tr1293. Defendants' expert Giberson stated that CD35 has one of the worst compactness scores of all DFW districts in the Plaintiffs' proposed interim plans. Giberson Decl. docket no. 468 at ¶ 11. Its area rubber band score is .331 and its perimeter to area score is .037, again very low. Joint Map Ex. J-14.

The NAACP asserts that African-American and Latino voters in Dallas and Tarrant Counties face many of the same hurdles in day-to-day life, including lack of access to health care, lack of fair educational opportunities, and persistent economic disparities. Docket no. 1280 at 41 (citing TrJ1134-35 (Magdaleno)). The NAACP also asserts that schools in Dallas County are still highly segregated and that Anglo officials are not responsive to minority needs. *Id.* (citing TrJ572 (Wallace) and TrA1184-86 (Moss)). Dr. Murray also opined that CD34 would be an effective district for African-American voters and CD35 would be an effective opportunity district for Latino voters. Tr1035-36.

Based on the districts' CVAP and the testimony of its experts, the NAACP asserts that it has demonstrated that proposed CD34 and CD35 comply with the first prong of *Gingles* and are legal and fair districts. Docket no. 406 at 21-29. However, the Court disagrees. Once again, Plaintiffs demonstrate that these districts meet the CVAP threshold and could elect minority candidates of choice, and even offer some evidence that the communities included within the districts contain some

similarities, but they have failed to proffer sufficient evidence to establish that the minority populations contained therein are compact. Dr. Fairfax's analysis is superficial and fails to adequately account for the fact that the districts do not appear to respect traditional boundaries. Although he looked at counties and noted the districts each only include one or two counties, he did not address cities, voting precincts, neighborhoods, or other geographical boundaries.

CD34 and CD35 both span Dallas and Tarrant Counties. CD35 extends a long tentacle into CD30, and CD30 reaches around with a long arm and hook at the top to grab minority population. CD35, which is the most visually bizarre, splits numerous small cities and appears to have little integrity in terms of traditional redistricting principles. The NAACP's proof suffers from the same deficiencies as CD6 in the Task Force Plan C190. Accordingly, the Court finds again that Plaintiffs have failed to demonstrate that two additional compact minority districts could have been drawn in DFW.

4. Plan C196

The LULAC Plaintiffs offer Plan C196, which they assert remedies the fracturing of minority communities in Dallas and Tarrant Counties and maintains CD30. Joint Map Ex. J-17. The LULAC Plaintiffs state that the minority areas that are placed in CD12, CD26, and CD33 in Plan C185 are adjacent to each other and together have sufficient population to create a congressional district, which is proposed CD34 in Tarrant County (which has a minority population of 73.8%). Docket no. 417 at 11. CD34 is 22.1% HCVAP and 29.4% Black alone CVAP. In Dallas County, the LULAC Plaintiffs propose that combining

the adjoining minority populations of CD5, CD6, CD24[80], and CD32 from Plan C185 with "a slight modification of adjoining District 30 . . . results in a new minority district that is similar to that in plan C196" and is over 80% minority population, while maintaining CD30 over 80% minority population. *Id.* at 12. CD30 (renamed CD32) is 49.7% Black alone CVAP (and 50.1% combined BCVAP) and CD33 is 39.5% HCVAP and 20.1% Black alone CVAP.

The districts in Plan C196 are not at ideal population. Further, while these districts are contained entirely within their respective counties, they again are not obviously compact, and no evidence has been presented showing that they respect communities of interest or otherwise take into account traditional redistricting principles. Thus, this map fails to demonstrate that two additional compact minority districts could have been drawn in DFW.

5. Plan C202

The Quesada Plaintiffs also offer demonstration Plan C202, which they assert draws CD34 and CD35 "more compactly" than the proposed districts in Plan C121/C192, "while maintaining them as minority opportunity districts, effective for Hispanic and African-American voters, respectively." Docket no. 409 at 17; Quesada-70. Quesada Plaintiffs state that CD34 "is an effective Hispanic opportunity district in the Dallas Fort Worth region" and is more compact than districts 2, 5, 9, 12, 15, 18, 20, 22, 28, 29, 32, 33, and 35 in the enacted plan. *Id.* at 17-18. They further assert that CD35 "is an effective

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[80] The brief states CD26, but that does not extend into Dallas County, so the Court presumes Plaintiffs meant CD24.

African-American opportunity district" and is more compact than districts 2, 5, 9, 12, 15, 18, 22, 28, 29, 32, 33, and 35 in Plan C185. *Id.*

Quesada Plaintiffs contend that these districts are "very compact." Docket no. 409 at 17. They are certainly an improvement visually over some of Plaintiffs' proposed districts, but they are still not obviously compact. And again, there is a lack of evidence in the record demonstrating how these districts comply with traditional redistricting principles or respect communities of interest. Thus, this map fails to demonstrate that two additional compact minority districts could have been drawn in DFW.

6. Plan C206 & Plan C214

Plan C206 is LULAC's DFW three-district proposal. The districts are similar to those in LULAC's Plan C196 and statewide Plan C214. In both maps, the districts are not at exactly equal population. More importantly, again there is a lack of record evidence concerning anything other than population statistics.

7. Plan C261 & Plan C262

LULAC's demonstration Plans C261 and C262 contain CD33, a coalition district located entirely within Tarrant County and CD6, a non-compact looking district in Dallas, Denton, and Tarrant Counties, in addition to CD30.[81] The compactness scores for CD33 are .600 area

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[81] Proposed CD33 in Plan C262 is somewhat similar to proposed CD35 in Plan C154 introduced during the session by Representatives Turner and Y. Davis and proposed CD34 in LULAC's Plan C196. Korbel testified that Plan C262 is similar to Plan C196. TrA1211 (Korbel); Joint Map Ex. J-17 (Plan C196).

rubber band and .125 perimeter to area. Red-315 Report. CD33 in Plan C262 is 28.7% combined BCVAP and 20% HCVAP, resulting in a combined 48.7% B+HCVAP using 2005-2009 ACS data. Using 2008-2012 ACS data, however, it is 51.7% B+HCVAP (22.1% HCVAP, 29.6% Black-alone CVAP). MALC-173 (docket no. 1259). Korbel noted that Plan C185 splits up the minority population in Tarrant County, but if the minority population that had been in the Plan C100 CD26 southern extension and the minority population included in the Plan C185 CD26 "lightning bolt" was connected with areas in eastern Tarrant County, which is heavily minority, "you have almost a perfect district, and a district that's overwhelmingly black and Hispanic, primarily black." TrA1223. He described this is a "logical district." *Id.*

Plan C262 also contains a proposed coalition district (CD6) mostly within Dallas County (though also extending into Tarrant County and partly into Denton County) that is 57.5% B+HCVAP using 2005-2009 ACS data. Korbel further testified that if he were starting over drawing districts in DFW, he "would take 30, shift it over, pick up five here and draw the second district right next to it" but instead the State had divided Dallas County into five districts, packing CD30, and cracking minorities in CD5 and CD6. Tr1224. Korbel also testified that the DFW districts in Plan C262 "the minority-preferred candidate appears to win virtually all the time." Tr1244

Once again, despite reaching the numerical threshold, the record fails to demonstrate how these districts respect traditional redistricting principles or communities of interest, and thus Plaintiffs fail to satisfy the first *Gingles* precondition for these districts.

8. Summary

Plaintiffs fail to proffer a demonstration plan accompanied by sufficient evidence to demonstrate that additional compact minority districts could be drawn taking into account traditional redistricting principles and communities of interest. Any plan not specifically discussed herein suffers from this same lack of evidence. However, Plaintiffs are not precluded from raising § 2 results claims with regard to Plan C235 during the trial on that plan.

C. Whether Plaintiffs have established a Shaw-type racial gerrymandering claim?

The Task Force asserts a *Shaw*-type Equal Protection racial gerrymandering claim with regard to specific districts in DFW. *See* docket no. 891 ¶ 53 (Task Force Fourth Amended Complaint) (Plan 185 uses race as a predominant factor to allocate Latino voters into and out of districts across DFW); docket no. 1308 at 2 (brief regarding *Alabama LBC*). Specifically, the Task Force asserts a *Shaw*-type racial gerrymandering claim against CD26 in Tarrant County and CD6 in Dallas County. Docket no. 1282 at 67 ("The State also assigned Latino voters in the Dallas Ft. Worth area into and out of CDs 6 and 26 on the basis of their race."); Docket no. 1274 at 278 (proposed FF 43) ("C185 also assigns Latino voters to districts on the basis of race in CD23, CD26 and CD6 in violation of the rule against race-based redistricting in *Shaw v. Reno*, 509 U.S. 630 (1993)."); TrA1963-64 (closing argument). Defendants contend that the Task Force has failed to demonstrate standing as to CD26, though they previously conceded standing as to CD6 because individual Plaintiff Renato de los Santos resided in CD6.

Certain other Plaintiffs also contend that they are bringing *Shaw*-type claims in DFW, but Defendants argue that those Plaintiffs have not alleged such claims.

1. Standing

It is well settled that a plaintiff must reside in the specific district subject to a *Shaw*-type racial gerrymandering claim in order to have standing. *Baker v. Carr*, 369 U.S. 186 (1962); *United States v. Hays*, 515 U.S. 737 (1995); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996). Early in this litigation, Defendants moved for dismissal of the Task Force's claims based on lack of standing, arguing that the Task Force individual Plaintiffs had failed to show they lived in congressional districts other than 6, 12, 23, and 27 and that its "organizational members cannot suffer vote dilution or racial discrimination." Docket no. 209 at 14. The Task Force responded that it included "Latino organizations committed to securing fair redistricting plans for Texas," including Hispanics Organized for Political Education (HOPE), the Mexican American Bar Association of Texas (MABA), the National Organization for Mexican American Rights (NOMAR), Southwest Voter Registration Education Project, the William C. Velasquez Institute, and Southwest Workers' Union. Docket no. 234 at 3. The Task Force argued that it had "standing to bring claims, in a representative capacity, on behalf of the individual members of its constituent organizations," that these individual members have standing to sue in their own right, and that the members of these organizations live throughout the State. *Id.* at 5, 7 (also citing responses to interrogatories stating that

Texas HOPE has more than 7,000 individual members living throughout Texas).

This Court denied Defendants' motion. It stated the general test for associational standing, including that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Docket no. 285 at 18-19. We held that "[t]he State asks for more factual specificity than is required at this stage of the litigation," though we recognized that more specificity might be required at the summary-judgment stage. *Id.* at 19; *see Ass'n of Comm. Organizations for Reform Now v. Fowler*, 178 F.3d 350, 357 (5th Cir. 1999) ("When the defendant moves for summary judgment because of lack of standing, . . . the plaintiff must submit affidavits and comparable evidence that indicate that a genuine issue of fact exists on the standing issue.").[82]

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[82] This Court's order did not expressly address Defendants' argument that the Task Force's member organizations did not suffer any harm sufficient to confer standing and that the Task Force could not base its standing on the standing of individual members of those member organizations. The Court holds that the Task Force has associational standing based on the standing of the individual members of its constituent organizations such as HOPE and NOMAR. *See Action Alliance for Senior Citizens of Greater Philadelphia v. Shapp*, 400 F. Supp. 1208, 1214 (E.D. Pa. 1975) (rejecting defendants' argument that Action Alliance lacked standing because its members were organizations rather than people since "defendants do not seriously dispute that there exists at the grass roots membership tier a substantial number of people" with standing); *Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp.

Although the State has filed motions since that time, including a motion to dismiss based on mootness (docket no. 995) and a motion for summary judgment (docket no. 996), it did not raise the issue of standing in those motions. And although this Court also has an independent obligation to confirm its jurisdiction, this Court also did not raise the issue again or require Plaintiffs to put forth more particularized proof.

After the 2014 trial in this case, the Supreme Court issued its decision in *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). Therein, the Court reiterated that *Shaw*-type claims are asserted with regard to specific districts and that an association has standing to bring suit on behalf of its members when its members would have standing to sue in their own right. The Court found that the evidence in the record supported the inference that the organization at issue had members in all of the State's majority-minority districts because "it seems highly likely that a 'statewide' organization with members in 'almost every county,' the purpose of which is to help 'blacks and other minorities and poor people,' will have members in each majority-minority district." *Id.* at 1269. The Court further found that nothing in the record

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689, 693 (E.D. Va.), *modified on other grounds sub nom. Campaign Clean Water, Inc. v. Train*, 489 F.2d 492 (4th Cir. 1973), *vacated on other grounds*, 420 U.S. 136 (1975) ("The fact that the groups representing the individuals injured rather than the individuals themselves are the actual members of Campaign Clean Water is unimportant, since it is the interests of the individual persons that plaintiff ultimately represents."); *see also Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 326 (D. Mass. 2013) (finding standing for umbrella organization of coalition of Ugandan organizations whose individual members had suffered harm).

would lead the Conference to reasonably believe that it needed to provide additional information such as a specific membership list, and there was no reason to believe it could not do so. *Id.* at 1269-70. Thus, as part of the remand, the district court was instructed to "reconsider the Conference's standing by permitting the Conference to file its list of members and permitting the State to respond, as appropriate." *Id.* at 1270. In light of the Supreme Court's decision, the Court directed the parties "to file briefs specifically identifying the districts for which they are asserting *Shaw*/racial gerrymandering claims and discuss how the Supreme Court's recent opinion . . . affects those claims," including whether additional factual development was required. Docket no. 1301.

In response, the LULAC, NAACP, and Rodriguez Plaintiffs disavowed bringing any *Shaw*-type claims in DFW.[83] Docket no. 1302. DOJ also disavowed any *Shaw*-

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[83] The Rodriguez Plaintiffs did plead Equal Protection Claims in their live Complaint (docket no. 896) that could be read to state a claim under both an intentional vote dilution and a *Shaw*-type theory. In paragraph 18, they allege that Plan C185 "fails to satisfy the requirements of the equal protection component of Section 1 of the Fourteenth Amendment" in at least the following particulars: (1) "Plan C185 purposefully fragments Hispanic and African- Americans in all regions of the state, dispersing them among numerous districts without regard to traditional and neutral redistricting principles, to reduce and lessen their electoral opportunities in congressional elections significantly below the level of opportunities that would be available to Hispanics were traditional and neutral redistricting principles followed. . . . (b) "Plan C185 purposefully fragments a politically cohesive coalition of African-American and Hispanic voters in the Dallas-Fort Worth Metroplex, in disregard of traditional and neutral redistricting principles, to reduce and lessen the electoral

type claims. Docket no. 1304. However, other Plaintiffs assert that they are bringing "racial gerrymandering" claims, though the State disputes that any party other than the Task Force has specifically pleaded *Shaw*-type racial gerrymandering claims. Instead, the State contends, other parties have asserted only intentional discrimination (vote dilution) racial gerrymandering claims. Docket no. 1310; *see Miller*, 515 U.S. at 910 (noting that a *Shaw*-type claim is "analytically distinct" from a vote dilution claim because a vote dilution claim "alleges that the State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential of racial or ethnic minorities,' an action disadvantaging voters of a particular race, while the essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts" regardless of motive).

Quesada Plaintiffs state that the "evidence developed in this case (at the 2011 and 2014 trials) show[s] that the following districts are unconstitutional racial gerrymanders: Districts 6, 12, 23, 26, 27, 30, and 33."

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opportunities of minority voters in the area in congressional election[s] and to give undue advantage to Anglo voters." Rodriguez Plaintiffs Josie Martinez and Nina Joe Baker are Hispanic registered voters who reside in CD26 in Plan C185. Pretrial Stip. 38, 39; Second Am. Compl. ¶ 2. However, their Advisory indicates that they are asserting only vote dilution claims in DFW, though their claim involving the dismantling of CD25 also contained elements of a racial gerrymander because "the predominance of race in the way it was accomplished also would invalidate it . . . as a racial gerrymander." Docket no. 1302 at 3 & n.1. The Court has addressed this claim above in relation to CD35.

Docket no. 1305 at 3.[84] [T]heir live Complaint (docket no. 899) asserts that they reside in proposed districts 6, 9, 12, 18, 20, 24, 29, 30, 33, and thus, it appears that they could have standing to assert their *Shaw* claims with regard to districts 6, 12, 30, and 33 in DFW.

The Quesada Plaintiffs previously asserted a packing claim related to CD30, and they phrased this claim in terms of both intentional vote dilution and a *Shaw* claim. Docket no. 409 at 9, 29 ("These actions by State officials were undertaken with an intent to pack minority voters and to allow racial or language minority group membership to be the predominant factor in the drawing of the Districts.").[85] Although Quesada Plaintiffs clearly

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[84] In 2011, Quesada Plaintiffs argued in their post-trial brief that "Plan C185 violates *Shaw v. Reno* and Its Progeny" and stated that "[e]xamples of congressional districts where race played the predominant role in creating the district include District 6, 9, 12, 18, 20, 25, 29, 30, and 33, among others." Docket no. 409 at 44, 29; *see also id.* at 45 (referencing districts 6, 12, and 26 in DFW as examples). They asserted that bizarre shape, in conjunction with certain racial and population-density data, may be "persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." Docket no. 409 at 45 (quoting *Miller v. Johnson*, 515 U.S. 900, 913 (1995)). They also asserted that if one overlays the district boundaries onto a map shaded for Hispanic and African-American population concentrations, "it is clear that race drove the process in creating these districts and that racial considerations subordinated traditional redistricting principles such as compactness, protecting communities of interest, and respecting political subdivision lines." Docket no. 409 at 46 (noting the CD26 lightning bolt picking up Hispanic communities).

[85] Quesada Plaintiffs Jane Hamilton and Kathleen Maria Shaw are African-American voters who would reside in CD30 in Plan C185. Docket no. 302.

asserted *Shaw*-type claims during the 2011 phase of litigation, Defendants contend that they no longer assert such claims because the racial gerrymandering language was omitted from their live complaint (docket no. 899), their (Joint) Post- Trial Brief (docket no. 1277) does not cite *Shaw* or *Miller* or specifically argue a racial gerrymandering claim, and their (Joint) Post-Trial Reply Brief (docket no. 1292) appears to "disavow" any *Shaw*-type claims. Docket no. 1310 at 4-5.

In their brief concerning *Alabama LBC*, Quesada Plaintiffs correctly assert that a substantial amount of the evidence relevant to the intentional discrimination claims "also supports a finding of unconstitutional racial gerrymandering because it demonstrates that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" Docket no. 1305 at 6 (quoting *Miller*, 515 U.S. at 916). Quesada Plaintiff's live Complaint, however, does not assert an obvious *Shaw*-type claim. The Fourteenth Amendment claims are couched only in terms of intentional discrimination and vote dilution. Therefore, the Court finds that Quesada Plaintiffs' live Complaint does not sufficiently state a *Shaw*-type racial gerrymandering claim.

MALC's Advisory asserts that it maintains *Shaw*-type racially gerrymandering claims against "the districts in Tarrant and Dallas Counties (primarily CDs 12 and 26)." Docket no. 1309 at 7 (citing MALC's Third Amended Complaint (docket no. 897) ¶¶ 56-65). MALC then contends that this Court "has already decided that MALC has standing," citing this Court's prior order at docket no. 285. Docket no. 1309 at 8. MALC notes that it previously disclosed its membership list (*see* docket no. 258). This list

demonstrates that it has members who reside in CD26 (Lon Burnam) and CD30 (Rafael Anchia and Roberto Alonzo), but not other DFW-area districts. MALC has provided no other information demonstrating that any of its members reside in CD12, and does not ask to supplement the record. As to a *Shaw*-type claim involving CD26 and CD30, MALC's live complaint does not clearly and distinctly allege such a claim. It alleges, "Latino and African American voters in Dallas and Tarrant Counties have been splintered and fragmented in both 2011 and 2013 to diminish their ability to effectively participate in the political process," but these allegations appear to support only their intentional vote dilution claim. Docket no. 897 at ¶ 73. The Court thus finds that MALC did not sufficiently state a *Shaw*-type racial gerrymandering claim to put Defendants on notice of such a claim.

The African-American Congresspersons state that they are asserting a racial gerrymandering claim regarding CD30 based on packing, since CD30 had its minority population increased even though it was already a safe functioning minority opportunity district. Docket no. 1307. However, this claim is phrased in terms of intentional vote dilution and racial discrimination. In addition, the record is clear that Congresswoman Johnson does not in fact reside in CD30 in Plan C185, nor do the other African-American Congresspersons. Thus, they lack standing to assert a *Shaw*-type claim as to CD30.

Thus, the only party that has clearly pleaded a *Shaw*-type racial gerrymandering claim with regard to the DFW districts in their live Complaint is the Latino Redistricting Task Force. As noted, Defendants previously conceded that the Task Force Plaintiffs have standing to assert this claim for CD6, given that individual

Plaintiff Renato De Los Santos lived in CD6 in Plan C185. However, Defendants argue that the Task Force Plaintiffs lack standing as to the other DFW districts (specifically CD26) because they have not put forth evidence that an individual with standing resides in one of the challenged districts.

The Task Force was formed during the 2011 legislative session and includes both organizational and individual members. The Task Force states that it has associational standing because it is composed of organizations with members who reside throughout Texas. It notes that the Supreme Court recognized that this fact makes it highly likely that it will have members in each district being challenged, and nothing in the record undermines the conclusion that the Task Force has standing through its members. The Task Force now seeks leave to file exhibits under seal that include addresses of named plaintiffs as well as members of the various organizations that are part of the Task Force. Docket no. 1314. The Task Force also notes that Renato De Los Santos no longer resides in CD6.

Defendants oppose the motion, arguing that the Task Force does not explain why it could not have introduced evidence of standing before or during trial, and that allowing the Task Force to supplement the record by filing out-of-court declarations from undisclosed witnesses would prejudice the State severely. Docket no. 1315. Defendants argue that the Task Force has had "every opportunity, and every reason, to prove standing." Docket no. 1310 at 8. Defendants contend that during discovery, the Task Force objected to an interrogatory asking it to identify each individual member of the association or its member associations with standing to

assert the claims, asserting a First Amendment privilege. *Id.* at 9.

In response, the Task Force notes that Defendants did request the names of members in 2011 and deposed representatives of the Task Force and two of its constituent statewide organizations,[86] but chose not to ask them to identify individual members who were affected and, following this Court's denial of Defendants' motion to dismiss for lack of standing in September 2011, did not raise the issue again. Docket no. 1313 at 5 n.2. The Task Force asserts that the current membership of HOPE and NOMAR includes Latino individuals who reside and are registered to vote in CD6 and CD26 in Plan C185. *Id.* at 6.

The Task Force's motion for leave to file its membership list under seal (docket no. 1314) is granted, and the Court finds that the Task Force has standing to pursue its *Shaw*-type claims with regard to CD6 and CD26 based on the individual standing of members of its constituent organizations who reside there. The Court initially found that the Task Force had satisfied the pleading standard for associational standing, and neither the Court nor Defendants again raised the issue. Given the undisputed existence of standing with regard to CD6 and the strong likelihood that an individual member of the Task Force's member organizations would have standing to challenge CD26, the Task Force was not dilatory in

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[86] The Task Force notes that HOPE, MABA, and Southest Worker's Union are statewide membership organizations, and that NOMAR has members who reside in Tarrant and Dallas Counties. Docket no. 1313 at 3. Defendants deposed Celeste Villareal, the legislative director for MABA, as a 30(b)(6) witness for the Task Force. Joint Ex. J-56.

seeking to admit evidence, especially given that the *Shaw* claims have not been a primary focus of the litigation, the issue had not been pressed by Defendants or the Court, and the Task Force had First Amendment and privacy concerns about releasing member information. Defendants are not surprised by this claim and were not so concerned about the issue to have raised it again via motion for summary judgment or otherwise. *See Mullaney v. Anderson*, 342 U.S. 415, 417 (1952) (allowing joinder of parties on appeal to address lack of standing and noting that "[t]o . . . require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration").

2. CD26 analysis

The evidence demonstrates (and Defendants do not deny) that Downton used race to assign Latino population into CD26 in Tarrant County (and relatedly, African-American population out of CD26 and into CD12). CD26 is the Denton County-based district that has the so-called "lightning bolt" extension into Tarrant County, and that lightning bolt is completely surrounded by CD12. It is undisputed that early in his mapdrawing process (around May 28, shortly before the first plan C125 was released), Downton used racial shading to make changes "to keep the Black population together" in CD12. TrA1618-21 (Downton); PL-1659. He stated that he made this change (putting "the areas of more concentrated black population" into CD12) in response to concerns raised by Interiano that he had divided the Fort Worth black communities, and he wanted to unite them as part of the principle of keeping communities of interest together, but not for specific compliance with the VRA. TrA1618,

TrA1621-22. He used racial shading because he did not "know Fort Worth at all" and the only way for him to identify the community of interest of "the Fort Worth black population" was racial shading. TrA1619-20 (Downton). Thus race played a predominant role in the original configuration of CD12 and CD26.

Downton also admitted to using race to assign Latino voters into CD26 and African-American voters into CD12 in Tarrant County later in the process. Downton 8-12-11 depo. (Ex. J-62) at 128 (noting that the CD26 lightning bolt contains "most, if not all, the concentrated Hispanic population of neighborhoods in Tarrant County"); TrA1625. But he claimed that this was to remedy a split of north and south Hispanic communities of interest. TrA1768 (he turned on racial shading to keep minority "communities of interest" together). At his 2011 deposition, Downton testified that the original map Plan C125 did not include the lower section of the lightning bolt, which is a largely Hispanic area, but there were "complaints" that he had split the Fort Worth Hispanic population. He stated that there was testimony at the hearing and "there [were] some public posts about it," but he could not remember where he had seen them. Downton 8-12-11 depo. (Ex. J-62) at 129. In the August 2014 trial, Downton stated for the first time that he had seen it on a blog and later identified the blog as gregsopinion.com. TrA1628, TrA1710, TrA1783-84, TrA1803.[87]

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[87] He testified that the blog had pictures with racial shading showing the two Hispanic areas in different districts. TrA1628. He testified that the blog pointed out that what he thought of as two distinct populations were considered one community. TrA1624. The blog entry entered into evidence by Defendants, D-715, complains only generally that Plan C125 fractures the minority community

Downton stated that mapdrawers "recognized their concern about splitting the Hispanic community" and put them together in one district "to help the Hispanic community" to give them "a solid voting block" that a candidate would need to consider. Downton 8-12-11 depo. (Ex. J-62) at 131-32. Downton also placed the primarily African-American community of Como into CD26 with the newly united Fort Worth Hispanic communities based on his recollection that Rep. Veasey had wanted Como with the Hispanic populations in HD90 in the House map.[88] As

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throughout the DFW area and connects minority populations to heavily-Anglo populations in surrounding counties. There is a map of DFW shaded by CVAP population, but it does not discuss the Hispanic population in Fort Worth specifically.

[88] At the 2011 deposition, Downton testified that Como, a primarily African-American community, had been placed originally in CD12 but Rep. Marc Veasey, an African-American member, believed it should be placed into CD26 with the Hispanic community because it would fit better there, though he was not sure if he recalled that correctly (he did not). Downton 8-12-11 depo. (Ex. J-62) at 129-30. In fact, as Downton correctly recalled in 2014, Downton modified the original plan to place the African-American community of Como into CD26 along with the newly united Hispanic population because he recalled that Rep. Veasey had wanted Como in "the Democrat Hispanic opportunity district" HD90 in the House map. TrA1625 (Downton), TrA1713-14 (Downton). Rep. Veasey and Rep. Burnam had objected to changes in the House map that removed the Lake Como area from HD90, Rep. Burnam's district, and Rep. Burnam had offered an amendment to return it that was defeated. Based on this recollection, Downton placed the African-American Como community with the Hispanic communities in CD26 when he was uniting the two Hispanic communities. TrA1625. However, Downton stated that Veasey "had different thoughts" about Como in the congressional plan, and that as a result "I moved it later." TrA1625; see also TrA1714 ("Mr. Veasey said that with respect to the congressional

a result, he stated, he put "almost all of the concentrated part" of the Hispanic population in Tarrant County into CD26, except parts excluded to accommodate Congresswoman Granger and the Trinity River Project, and these changes were reflected in Plan C144, Solomons' statewide substitute plan. *Id.* at 132.

The criteria for these assignments was race, and Downton used racial shading to select population. TrA1619 (Downton) (stating that he looked at racial shading at the VTD level and "saw two Hispanic populations, a northern population and a southern population"); TrA1621-22 (Downton) ("I also looked at the Hispanic population and I saw two distinct Hispanic communities. . . . [A]nd so I kept each of those communities together."); TrA1624 (Downton) ("I think this is the map where I tried to put the two Hispanic communities back together. And to do that, I would have pulled up racial shading."); TrA1789 (stating that the characteristics the areas had in common were that they were both Latino and they were both in Fort Worth).[89] Although Downton knew that the Hispanic populations were included in HD90 in the House plan, he did not overlay the contours of HD90 when assigning population into CD26. TrA1711-12 (Downton). Downton admitted that he did not "have any personal knowledge of the community characteristics for the residents who live

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map, it was more appropriate to have Como with the black population that was in the other district, so he took it back out.").

[89] Racial shading shows that Latino population is captured in CD26 and African-American population is largely excluded and placed in CD12. *E.g.*, PL-1145; PL-1146.

inside the lightning bolt of Congressional 26." TrA1710. He "used racial shading to identify the community of interest that [he was] seeking to place together in [CD]26." *Id.*[90] The Como area was later removed from CD26 and placed back into CD12 as part of an amendment (Plan C169) introduced by Anglo Republican Charlie Geren, which Geren said on the floor was "a swap between Congressional Districts 12 and 26" to make downtown Fort Worth whole, put the entire city of Westlake in the same district, and "unite the black communities in Fort Worth." D-23 at S3. The amendment was adopted. D-23 at S3; TrA1629 (Downton). Thus, it is undisputed that race was an important criteria for the assignment of population into and out of CD26.

Downton testified that he felt it was "damned if you do, damned if you don't" with regard to using race to keep minority communities together in DFW, because if he did not, he would be accused of dividing the minority community, but if he did, he would be accused of improper racial gerrymandering.[91] He testified that he felt it was in

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[90] Dr. Arrington noted that CD26 in Tarrant County has 38 precinct splits, and further stated that the precinct splits in the so-called "lightning bolt" "split off the Hispanic population" and put it into CD26. TrA410. He found that it was "incomprehensible that it was done on any basis other than race." TrA472. (The Court notes that, while there are 38 precinct splits in CD26 in Tarrant County, 36 are in the lightning bolt, while two are in the short eastern protrusion.)

[91] Judge Smith specifically asked the parties in closing argument to discuss "when if ever is it legitimate to use racial shading whether it's through RedAppl or any other means? Can it be used, for example, to join together minority communities of interest?" TrA1967. In addition, the State of Texas has argued in this case that it did not know how to comply with both the VRA and the Equal

error to split the Hispanic population and although he knew CD12 and CD26 were not protected districts, he felt he was following the "traditional redistricting principle . . . to keep communities of interest together" and "people want to do that and thought we needed to for Voting Rights Act in that district." TrA1745. However, he also stated that he did not personally think that. *Id.* It was not his view that they needed to be kept together, but "people raised the issue" and "a possible legal challenge, so [he] changed it to address that concern and prevent a legal challenge on the basis that it would split up minority groups." TrA1746.

David Hanna of the TLC testified that, with respect to assignment of minority neighborhoods in DFW, his advice was just that minority neighborhoods, either Black or Hispanic, be kept whole, even though he knew they would not be creating a minority opportunity district. TrA1546-47, 1574-76. He did not want there to be a consistent pattern of dividing minority neighborhoods. TrA1574. He examined whether whole neighborhoods were being split up in DFW by looking at racial shading at the

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Protection Clause. It has also argued recently in an amicus brief before the Supreme Court that redistricting is a "minefield" requiring states to get the use of race "just right." However, the requirements for using race are not that treacherous. Nina Perales identified acceptable uses of racial shading, and noted that "what Mr. Downton did in Tarrant County is probably the example of what you should not do, which is turn on racial shading and simply select people for different congressional districts based on that and that alone, without a knowledge of the community, without a knowledge of socioeconomic status, or cultural, or community patterns. There [has] to be more to it, especially if you're just gathering people together without a remedial purpose." TrA1968.

VTD/precinct level. TrA1547-48, 1568-69. He recalled giving that advice after being asked by Doug Davis or Interiano, but he did not remember to whom he mentioned it. TrA1548, 1569. Thus, he said that he thought that it was better not to divide a black neighborhood or a Hispanic neighborhood and assign those different districts, but he did not express an opinion as to whether Blacks and Hispanics should have been divided from each other or not. TrA1546.

Given the apparent and admitted use of race in assigning population into CD26 in Tarrant County, Plaintiffs contend that strict scrutiny applies and that, because the districts were not majority-minority, no compelling state interest justifies the use of race. Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. *Bush*, 517 U.S. at 958 (O'Connor, J.). Nor does it apply simply because members of racial groups are concentrated in specific districts, as that may be the result of legitimate redistricting principles that have nothing to do with race. *Shaw v. Reno*, 509 U.S. 630, 646 (1993).

However, in this case we have admissions from the mapdrawer that he used race as the sole criteria for assigning a significant portion of voters into and out of CD26, and that his sole basis for regarding them as a community of interest was their race, given that he had no familiarity with the area. "When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Miller v. Johnson*, 515 U.S. 900, 911-12 (1995). Justice O'Connor recognized that it is evidentially

significant that this is what has occurred if the mapdrawer used racial data but made no apparent attempt to compile or refer to equivalent data regarding communities of interest. *Bush*, 517 U.S. at 967 (O'Connor, J.).[92]

Laws that classify citizens on the basis of race are constitutionally suspect, regardless of whether the reason for the classification is benign or the purpose remedial. *Shaw*, 517 U.S. at 904-05. The essence of a *Shaw* equal protection claim is that the State has used race as a basis for separating voters into districts. *Miller*, 515 U.S. at 911. That is precisely what occurred here, and thus strict scrutiny applies.

A racial classification may be justified if it is narrowly tailored to serve a compelling state interest, such as compliance with the VRA. The narrow tailoring analysis requires that "the legislature have a 'strong basis in evidence' in support of the (race-based) choice that it has made." *Alabama LBC*, 135 S. Ct. at 1274. This standard "does not demand that a State's actions actually be

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[92] Similarly, Justice Kennedy explained in *Miller*, 515 U.S. at 919, that a State's districting legislation cannot be rescued "by mere recitation of purported communities of interest":

> A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests. "[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes." But where the State assumes from a group of voters' race that they "think alike, share the same political interests, and will prefer the same candidates at the polls," it engages in racial stereotyping at odds with equal protection mandates.

Id. at 920 (citations omitted).

necessary to achieve a compelling state interest in order to be constitutionally valid," and legislators "may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have good reasons to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance." *Id.* (emphasis omitted).[93] The Legislature here did not have a strong basis in evidence for the race-based choice of uniting the north and south Fort Worth Hispanic communities in CD26. Downton, the person who made the decision to place both communities together in CD26, admitted that he did so solely on the basis of race, that he used racial shading to do so, and that he was not himself familiar with the communities he was joining other than that they lived in Fort Worth and were Hispanic. Though he stated that he learned from a blog that he had split what was considered one Hispanic community, that testimony was not credible, and even if it were believed, does not provide a "strong basis in evidence" that these communities should be considered a community of interest apart from their shared race. Moreover, Downton admitted that he personally felt that placing these Latino communities together in a district would not be necessary to comply with either § 2 or § 5 of the VRA, given that they still remained a significant minority without ability to elect in CD26, yet he made the decision to do so. The fact that some decisionmakers and advisors might have been concerned that they would be accused of splitting minority populations if they did not unite these communities in CD26 (and exclude African-

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[93] These principles were recently affirmed in *Bethune-Hill v. Virginia State Board of Elections*, __ U.S. ___(2017).

Americans to "unite" them in CD12) is insufficient to establish a strong basis in evidence that these race-based actions were necessary to comply with the VRA. *See Shaw*, 517 U.S. at 908 n.4.[94] Accordingly, the Court finds that the use of race in CD26 violates the Equal Protection Clause.

3. CD6 analysis

The Task Force further asserts a *Shaw*-type claim with regard to CD6. CD6 includes all of Ellis and Navarro Counties and joins them to Tarrant and Dallas Counties with divergent finger-like extensions. Approximately half (358,632 persons) of CD6's population comes from Dallas County, while 142,511 persons from Tarrant County are included, and the remainder are the population of Ellis County (149,610) and Navarro County (47,735). Ellis County is 32.7% combined African-American and Hispanic population. Navarro County is 37.9% combined African-American and Hispanic population. The portion ofTarrant County included is 39.2% combined African-American and Hispanic population. However, the portion of Dallas County included is 75.8% combined African-American and Hispanic population. With these areas combined, the population of CD6 is 56.5% combined African-American and Hispanic population and 39.5% Anglo population, but it is only 51.5% combined African-American and Hispanic voting age population, and is majority Anglo (57.7%) CVAP.

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[94] While complying with the VRA is a compelling state interest, obtaining preclearance and avoiding potential litigation for their own sakes and without a strong basis in evidence that race-based actions are required for VRA compliance are not compelling state interests.

To demonstrate that race-based criteria predominated in the drawing of portions of CD6, the Task Force relies in part on evidence that Downton split numerous precincts and that certain precinct splits (specifically 1105, 1127, 4614, 4610, 4433) place portions with more Hispanic population inside CD6 and areas with less Hispanic population outside of CD6. Docket no. 1308 at 12; docket no. 1274 at 217 (proposed FF 1389-1391) (citing TrA1721-24 (Downton); PL-1155; PL-1156; PL-1157). The Task Force also states that "the bizarre boundaries" of CD6 indicate that race was the predominant factor in its creation. Docket no. 1308 at 12 n.5.

Downton testified that in CD6, he would not have been "drawing to pull in Hispanics" because it was not a Hispanic opportunity district. TrA1720. Downton testified that he thought these splits were "zeroing out," but agreed that some were placing more Hispanic population inside CD6 and less Hispanic population outside CD6. TrA1720-24. However, he also stated that, as he did in CD26, he "would have attempted to keep communities of interest together in 6 as well." TrA1720-21. Although there is some evidence indicating that race was used to allocate some population into CD6, the Court finds that Plaintiffs have failed to demonstrate that race predominated and that other redistricting principles were subordinated to race, such that their *Shaw*-type claim related to CD6 must fail.

D. Intentional vote dilution claims

Some Plaintiffs allege that Defendants violated the Fourteenth Amendment through intentional vote dilution; other Plaintiffs bring intentional vote dilution

claims under § 2 of the VRA; and some Plaintiffs assert both types of intentional vote dilution claims.[95] As noted, an intentional vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities. *Miller v. Johnson*, 515 U.S. 900, 911 (1995). "In the context of single-member districts, the usual device for diluting minority voting power is the manipulation of district lines," either by dividing the minority group among various districts (fragmenting or "cracking") or concentrating minority voters within a district ("packing"). *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). In other words, the "'[d]ilution of racial minority group voting strength may be caused' either 'by the dispersal of [minorities] into districts in which they constitute an ineffective minority of voters or from the concentration of [minorities] into districts where they constitute an excessive majority.'" *Id.* at 154 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986)); *see also Shaw v. Hunt*, 517 U.S. 899, 914 (1996) ("a Plaintiff may allege a § 2 violation in a single-member district if the manipulation of districting lines fragments politically cohesive minority voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population").[96]

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[95] The NAACP brings intentional vote dilution claims under the Fourteenth Amendment, but does not appear to bring them under § 2 (instead asserting only results claims). DOJ brings intentional vote dilution claims only under § 2. The Task Force Plaintiffs bring claims under both § 2 and the Fourteenth Amendment.

[96] "When a redistricting plan employs [cracking] in a racially polarized environment, the result is predictable: Like a multimember

Plaintiffs here allege that the Legislature intentionally packed minority voters into CD30 and otherwise cracked minority populations throughout DFW to dilute their voting strength. *E.g.*, docket no. 1277 (Joint Post-Trial Brief) at 11, 57-66. Plaintiffs allege that the one existing minority opportunity district, CD30, was packed "far in excess of what is needed to create an ability to elect district" and that the State deliberately created a packed district to waste minority votes and diminish the possibility of placing minority voters into an additional ability-to-elect district. Docket no. 603 (Joint Advisory) at 13; *see also* docket no. 1279 (United States Post-Trial Brief) at 2.

Plaintiffs further allege that the minority neighborhoods in DFW are cracked into different congressional districts, CD5, CD6, CD12, CD26, and CD33, which will all be dominated by Anglo voters, and in which minority voters cannot elect candidates of choice. *E.g.*, docket no. 603 at 11-13; docket no. 1279 (United States Post-Trial Brief) at 2; docket no. 409 (Quesada Post-Trial Brief) at 9-10. They assert that the district lines are "bizarre in shape because they have been configured

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plan, [a single-member district plan which fractures a geographically concentrated minority voting population] . . . tends to dilute the voting strength of the minority." *Major v. Treen*, 574 F. Supp. 325, 353 (E.D. La. 1983). "The most crucial and precise instrument of the . . . denial of the . . . minority's equal access to political participation, . . . remains the gerrymander of precinct lines so as to fragment what could otherwise be a cohesive minority voting community. . . . This dismemberment of the [minority] voting community . . . [may have] the . . . effect of debilitating the organization and decreasing the participation of [minority] voters." *Kirksey v. Bd. of Supervisors*, 554 F.2d 139, 149 (5th Cir. 1977).

to avoid the creation of a majority-minority district or districts in the North Texas area." Docket no. 603 at 11.

Expert witness Richard Murray testified that minority populations were packed into CD30 and otherwise cracked, and despite the fact that population changes (out-migration of inner-city Anglos and increase in minority populations) are making it easier to draw districts to benefit minority voters, the map intentionally avoids creating any such districts. Tr1044; TrA1397-98. He noted that districts around Dallas and Tarrant Counties "link[] up a lot of these inner-city neighborhoods with folks way out, mostly Anglo folks with a history of polarized voting against minorities and high turnout that are going to overwhelm the minority voters in these inner-city neighborhoods." Tr1044. He noted that many districts outside urban cores were regularly shaped, while in the inner city, "where all this minority growth is occurring," there are convoluted districts and "there's gerrymandering going on here." TrA1395.

Dr. Arrington testified that it was possible to create additional minority opportunity districts (not necessarily Hispanic majority but effective) in DFW, but Plan C185 employed cracking by breaking up large, heavily-populated minority populations into a number of different districts so that they are unable to elect a candidate. TrA407, TrA456, TrA474-75. He stated that mapdrawers "took Anglo-dominated suburban districts and they took fingers from those districts and brought them into the Dallas/Fort Worth area to pick up some of the Hispanic population so that that population becomes cracked." TrA407. Arrington noted that there are four essentially suburban districts that move into Dallas County to pick up approximately 624,000 Hispanics. TrA408; US-758_17

(Arrington testimony powerpoint). And the same pattern exists in Tarrant County—one bizarrely shaped district (CD12) is entirely within Tarrant County, while four suburban districts move into Tarrant County to extract minority population. TrA408-09. He felt this was evidence of discriminatory purpose, as was the bizarre shapes of the districts. TrA407-08. He also testified that, rather than moving in the direction of unifying the growing Hispanic community in DFW, "we've cracked it that much greater than was done in [the benchmark]." TrA475.

1. Applicable standards

In *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980), the Supreme Court held that an intentional vote dilution claim under the Fourteenth Amendment requires proof that the disputed plan was conceived or operated as a purposeful device to further racial discrimination by minimizing, cancelling out, or diluting the voting strength of racial elements in the voting population. The Court noted that the requirement that there be purposeful discrimination for a violation of the Equal Protection Clause set forth in *Washington v. Davis*, 426 U.S. 229 (1976), *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), applied to claims of racial discrimination affecting voting "just as it does to other claims of racial discrimination." 446 U.S. at 66-67.

In *Arlington Heights*, 429 U.S. at 266, the Court noted that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *See also Hunter v.*

Underwood, 471 U.S. 222, 228 (1985) ("Proving the motivation behind official action is often a problematic undertaking."). In *Shaw v. Reno*, 509 U.S. 630 (1993), the Supreme Court recognized "the difficulty of determining from the face of a single-member districting plan that it purposefully distinguishes between voters on the basis of race," especially because the "legislature always is *aware* of race when it draws district lines," just as it is aware of a variety of demographic factors. *Id.* at 646 (emphasis in original). However, *Arlington Heights* set forth certain types of circumstantial evidence that may be considered to determine intent, including: the impact of the official action, including whether "it bears more heavily on one race than another"; the historical background of the jurisdiction's decision, particularly if it reveals a series of official actions taken for invidious purposes; the specific sequence of events leading up to the challenged decision; departures from the normal procedural sequence; substantive departures, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached; and the legislative history, especially any contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. 429 U.S. at 267-68; *see also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488-89 (1997).

To prove intentional vote dilution under the Fourteenth Amendment, plaintiffs must show both discriminatory purpose and discriminatory effect. *York v. City of St. Gabriel*, 89 F. Supp. 3d 843, 850, 864 (M.D. La. 2015); *Backus v. S. Carolina*, 857 F. Supp. 2d 553, 567

(D.S.C.), *summ. aff'd*, 133 S. Ct. 156 (2012).[97] The role that § 2 and *Gingles* play in intentional vote dilution claims as opposed to results-only claims is somewhat unsettled. Congress amended § 2 of the VRA to allow results-only vote dilution claims in response to the Supreme Court's imposition of an intent requirement, and the Supreme Court established the standard for such results claims in *Gingles* and its progeny. Although Congress noted the difficulty and expense involved in proving intentional discrimination and that charges of purposeful discrimination can have a divisive impact, it expressly stated that voters could seek to prove a violation of § 2 through *either* a results-only claim or a discriminatory purpose claim. *United States v. Brown*, 561 F.3d 420, 432-33 (5th Cir. 2009); *McMillan v. Escambia Cty., Fla.*, 748 F.2d 1037, 1046 (5th Cir. 1984) ("Congress intended that fulfilling *either* the more restrictive intent test or the results test would be sufficient to show a violation of section 2.") (emphasis in original); S. Rep. No. 97-417 at 27 ("The Amendment to the language of section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the

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[97] To the extent Defendants argue that Plaintiffs' intentional discrimination claims fail because there was no discriminatory effect from the 2011 plans because they were never used, that is more properly viewed as a mootness argument, which the Court has already rejected. The Court will evaluate the discriminatory effect of Plan C185 in terms of its effect on voters had it been used.

jurisdiction in question, results in minorities being denied equal access to the political process.") (footnote omitted).[98]

Because intent is not an element of results-only claims and results-only claims are usually easier to prove, few voters have asserted intentional vote dilution claims since § 2 of the VRA was amended,[99] and thus the Supreme Court has not had occasion to establish a specific analytical framework for intentional vote dilution claims post-amendment and post-*Gingles*.[100] Thus, while there is Supreme Court guidance regarding what plaintiffs must show to prove dilutive effects under the § 2 results test

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[98] The Senate Report further states that if a § 2 plaintiff chooses to prove discriminatory intent, "direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions" would be relevant evidence of intent. *McMillan*, 748 F.2d at 1047 (quoting S. Rep. No. 07-417,at 27 n.108).

[99] *See Veasey v. Abbott*, 830 F.3d 216, 335 n.15 (5th Cir. 2016) (Costa, J., dissenting in part) (noting that "[t]he impact that making the typically easier-to-prove effects test an equally powerful avenue of relief has on purpose claims can be seen from the drop in the number of discriminatory purpose claims brought in voting cases after the 1982 amendments to the Voting Rights Act made effects a basis for section 2 liability").

[100] As the Fifth Circuit has noted, prior to *Bolden*, "there was relatively little judicial interpretation of section 2" and "most courts chose to deal exclusively with the constitutional standards, probably under the assumption that the standard under section 2 was equivalent." *McMillan*, 748 F.3d at 1042 n.9. The Fifth Circuit further noted that, in *Bolden*, the Supreme Court explicitly held that "the language of § 2 no more than elaborates upon that of the Fifteenth Amendment and the sparse legislative history of § 2 makes it clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." *Id.* (quoting *Bolden*, 446 U.S. at 60-61).

(*e.g.*, *Gingles* and its progeny) and there is precedent concerning the proof required to show discriminatory intent in intentional vote dilution cases under the Fourteenth Amendment, the level of proof of dilutive effects required in a § 2 intentional vote dilution claim is less clear.

> As one court has stated,
>
> > [T]he effects standard for an intentional vote dilution claim is uncertain, largely because of a dearth of precedent. The cases provide little direct authority as to the requisite degree of dilutive effect for an intentional discrimination claim under either the constitution or the statute. This is so in part because direct evidence of discriminatory intent is relatively rare, and thus plaintiffs generally prefer to bring traditional § 2 vote dilution cases where intent need not be shown, rather than constitutional or statutory intentional vote dilution claims. In fact, since the 1982 amendments to the Voting Rights Act, which eliminated the intent requirement for statutory vote dilution claims, there has been a virtual absence of intentional vote dilution litigation.

Cano v. Davis, 211 F. Supp. 2d 1208, 1248-49 (C.D. Cal. 2002) (citations omitted), *summ aff'd*, 537 U.S. 1100 (2003). The *Cano* court agreed with the plaintiffs in that case that "where invidious intent exists in a vote dilution case, it may be appropriate to relax the first or even second of the *Gingles* pre-conditions, as well as to consider intent in connection with the 'totality of the circumstances' inquiry." *Id.* at 1249. Nevertheless, it held that "plaintiffs in vote dilution cases must still show a

practical effect on the minority group's ability to elect representatives of choice, whether or not intent is shown." *Id.* at 1249-50. The court concluded that the "irreducible minimum" showing would be that a minority group's preferences are regularly defeated by a non-minority bloc of voters. *Id.* at 1250.

After the *Cano* case, the Supreme Court expressly stated in *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009), that it did not consider "whether intentional discrimination affects the *Gingles* analysis" and that its holding (setting forth the majority-minority requirement to satisfy the first *Gingles* factor for a § 2 results claim) "does not apply to cases in which there is intentional discrimination against a racial minority."[101] The Court has not had occasion to further clarify the standard.

A 2011 case, *Committee for a Fair and Balanced Map v. Illinois Board of Elections*, No. 1:11-CV-5065, 2011 WL 5185567, at *3 (N.D. Ill. Nov. 1, 2011), noted that "[t]he circuit courts that have addressed this issue have taken

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[101] The Supreme Court cited the Unites States' amicus brief arguing that evidence of discriminatory intent "tends to suggest that the jurisdiction is not providing an equal opportunity to minority voters to elect the representative of their choice, and it is therefore unnecessary to consider the majority-minority requirement before proceeding to the ultimate totality-of-the-circumstances analysis." *Bartlett*, 556 U.S. at 20. In distinguishing intentional vote dilution cases, *Bartlett* also cited *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), in which the Ninth Circuit rejected the County's argument that plaintiffs had to show they could have constituted a majority when they alleged intentional discrimination. The Ninth Circuit held that "to the extent that *Gingles* does require a majority showing [for a vote dilution claim under § 2], it does so only in a case where there has been no proof of intentional dilution of minority voting strength." *Garza*, 918 F.2d at 769.

varying approaches," with the Ninth Circuit in *Garza* holding that both intent and injury must be shown, but that *Gingles*' majority-showing requirement did not apply when there was proof of intentional vote dilution, and the Eleventh Circuit in *Johnson v. DeSoto County Board of Commissioners*, 72 F.3d 1556, 1561-63 (11th Cir. 1996), holding that intent would be considered as circumstantial evidence of discriminatory results in assessing the totality of the circumstances. The Illinois court held that "[a] showing that the drafters of the plan intended to discriminate very well may lead to the conclusion that the plan had its intended effect, but the other factors in the totality of circumstances test are still relevant in resolving the issue." *Committee*, 2011 WL 5185567, at *4. Thus, it concluded, "the first *Gingles* factor is appropriately relaxed when intentional discrimination is shown, but [plaintiffs] will nevertheless have to show that the plan lessened [minority] opportunity to elect a candidate of [their] choice" by satisfying the second and third *Gingles* preconditions. *Id.*

In a later opinion, the Illinois court again re-affirmed and expanded on this framework, concluding that, where a plaintiff shows intentional discrimination, the first *Gingles* precondition is relaxed, though discriminatory intent alone "will not carry the day." *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 581 (N.D. Ill. 2011). Thus, "[f]ailing proof of the first *Gingles* factor, [plaintiffs] may show discriminatory effect through circumstantial evidence of discriminatory intent," and including, but not limited to, evidence of bloc voting along racial lines; low minority voter registration; exclusion from the political process; unresponsiveness of elected officials to needs of minorities; depressed socio-

economic status attributable to inferior education and employment and housing discrimination; minority retrogression; manipulation of district boundaries to adjust the relative size of minority groups, including the "packing" of minority votes; proportionality; and the *Arlington Heights* factors. *Id.* at 581-82.

This Court agrees that, when discriminatory purpose (intentional vote dilution) is shown, a plaintiff need not satisfy the first *Gingles* precondition to show discriminatory effects. The Court thus rejects Defendants' argument that Plaintiffs can show intentional vote dilution through packing and cracking only if they show that it prevented the creation of an additional CVAP-majority district. If plaintiffs had to satisfy the *Gingles* test, there would be little point in allowing them to alternatively pursue intentional discrimination claims, as Congress stated its intent to do in the Senate Report. However, plaintiffs still must show some discriminatory effect, and in making that determination, the Court will consider the other § 2 *Gingles* and totality-of-the-circumstances factors.[102]

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[102] *See United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1574 (5th Cir. 1984) (noting that the "same evidence is relevant to both theories" of intent and results). In *Rogers v. Lodge*, 458 U.S. 613, 623-24 (1982), the Supreme Court stated that evidence of racial bloc voting and lack of success of African-American candidates despite their substantial population bore "heavily on the issue of purposeful discrimination." However, such evidence alone would not be sufficient to prove purposeful discrimination "absent other evidence such as proof that blacks have less opportunity to participate in the political processes and to elect candidates of their choice." *Id.* at 624. To that end, the Court discussed the district court's analysis of the "impact of past discrimination on the ability of blacksto participate effectively in the political process" (such as by contributing to low voter

2. Racial motive

The Court thus turns to whether Plaintiffs have demonstrated a racially discriminatory motive in the drawing of district lines (specifically, by packing and cracking) in the DFW area. A primary difficulty in this case lies in the fact that race and political party affiliation are strongly correlated in Texas, and Defendants contend that they were merely engaged in partisan gerrymandering, which had a foreseeable negative effect on minority voting strength (because cracking Democrats necessarily means cracking minority populations). Defendants argue that they did not engage in intentional vote dilution of minority voting strength, but only of Democrat voting strength.

It is undisputed that Defendants engaged in extreme partisan gerrymandering in drawing the map, ignoring many if not most traditional redistricting principles in their attempt to protect Republican incumbents, unseat Democrat Lloyd Doggett, gain additional Republican seats, and otherwise gain partisan advantage. Defendants do not really dispute the fact that minority populations are

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registration), "evidence of exclusion from the political process" (exclusion from the Democratic Party County Executive Committee, property ownership requirements, and discrimination in the selection of grand jurors, hiring of county employees, and appointments to boards and committees that oversee county government), evidence that elected officials of the County had been unresponsive and insensitive to the needs of the African-American community, which increases the likelihood that the political process was not equally open to African Americans, evidence of the depressed socio-economic status of African Americans in the County, and other factors that the Court had "indicated enhance the tendency of multimember districts to minimize the voting strength of racial minorities." *Id.* at 624-27.

divided or "cracked" in the plan, but they assert that the cracking was only an effect of partisan gerrymandering, not of discriminatory purpose.

Defendants say all lines were drawn on partisan or other legitimate, non-racial criteria, without racial motive or racial decisionmaking, except where they believed the use of race was necessary to comply with the VRA. Defendants contend that the VRA did not compel the Legislature to draw an influence district or even a performing district for minorities under the circumstances, and also did not protect minorities from the foreseeable effects of political gerrymandering. Because their reason for not drawing minority districts was political, Defendants contend, it was not racially discriminatory. Plaintiffs acknowledge Defendants' partisan intent, but contend that the mapdrawers had both partisan and racial intent and that they used racially discriminatory linedrawing to advance their partisan interests. And they argue that so long as they demonstrate that racial discrimination was a motivating factor, they have made out a prima facie case of discrimination.

Plaintiffs correctly note their burden is not to prove that race was the sole decisionmaking factor or motivation, and that discriminatory purpose need only be "a motivating factor." *Arlington Heights*, 429 U.S. at 265-66; *Veasey v. Abbott*, 830 F.3d 216, 230 (5th Cir. 2016).[103] "Intentions to achieve partisan gain and to racially discriminate are not mutually exclusive." *Veasey*, 830

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[103] *E.g.*, docket no. 1065 (joint response to MSJ) at 7; docket no. 1080 (Task Force response to MSJ) at 5-6; docket no. 1291 (United States post-trial reply brief) at 8-9.

F.3d at 241 n.30. Upon such a showing that race was a motivating factor, the burden shifts to the Defendants to demonstrate by a preponderance of the evidence that the action would have been taken anyway. *Hunter*, 471 U.S. at 228 ("Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor."); *Arlington Heights*, 429 U.S. at 270 n.21; *Veasey*, 830 F.3d at 231.

It is undisputed in this case that voting in Texas is strongly racially polarized,[104] and this polarization was reflected in the fact that 93 of the 101 Republican members of the House in 2011 were Anglo, while only 8 of the 49 Democrat members were Anglo. As the Fourth Circuit recently acknowledged, the presence of racially polarized voting provides a strong incentive for intentional discrimination, commonly through vote dilution, because "[i]t is the political cohesiveness of the minority groups that provides the political payoff for legislators who seek to dilute or limit the minority vote" and "racially polarized voting may motivate politicians to entrench themselves through discriminatory elections laws" by targeting groups unlikely to vote for them. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214, 222 (4th Cir. 2016).

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[104] Defendants dispute the cause of racially polarized voting, the legal sufficiency of racially polarized voting, and the existence of racially polarized voting in Nueces and Kleberg Counties. However, they do not dispute that people of different races vote differently from one another, and that minorities tend to vote Democrat while Anglos (Austin/Travis County excepted) generally tend to vote Republican.

The Supreme Court noted in *LULAC v. Perry* that the Legislature's actions that diluted Latino voting strength in order to protect a Republican incumbent bore "the mark of intentional discrimination." *LULAC*, 548 U.S. at 440. The Supreme Court also recognized that the existence of racially polarized voting resulting in a lack of minority success despite their majority status was highly relevant to the issue of purposeful discrimination in *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). It noted, "Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race" such that the "fact that none have ever been elected is important evidence of purposeful exclusion." *Id.* at 623-24.

The Ninth Circuit in *Garza* similarly recognized that partisan motive (specifically incumbency protection) may go hand-in-hand with racially discriminatory purpose. *Garza*, 918 F.2d at 771 (finding that racially discriminatory intent was coupled with the intent to preserve incumbencies and stating that "discrimination need not be the sole goal in order to be unlawful"). The Seventh Circuit in *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984) noted that "[s]ince it is frequently impossible to preserve white incumbencies amid a high black-percentage population without gerrymandering to limit black representation, it seems to follow that many devices employed to preserve incumbencies are necessarily racially discriminatory."

Thus, while Defendants assert that the strong correlation between party and race supports their position that what looks like racial discrimination is in fact only partisan discrimination, it is also highly relevant to

Plaintiffs' intentional vote dilution claims. As the United States correctly argues, in an intentional vote dilution claim, "partisanship and intentional vote dilution are not an either/or proposition; the two goals can co-exist, one serving the other." Docket no. 1279 at 72.

However, to some degree, the parties in this case mischaracterize their opponents' positions regarding the impact of the strong overlap between race and politics in Texas. For example, the NAACP claims that the State relies on *Easley v. Cromartie*, 532 U.S. 234 (2001), "for the proposition that the Supreme Court had endorsed discrimination along racial lines so long as race was highly correlated with partisanship." Docket no. 1280 (NAACP Post-Trial Brief) at 9. But that is not Defendants' position. Rather, they argue that the State may draw lines and even intentionally discriminate on the basis of partisanship (politically gerrymander) despite knowing that there is a strong correlation between race and partisanship and despite knowing that such political gerrymandering will foreseeably negatively affect and dilute the vote of minorities. They argue that taking action *despite* its predictable effect on race is not the same as taking action *because of* its effect on race, and so long as its actions are merely the former, there is no intentional race discrimination. In partial support of their position, Defendants rely on certain language from *Shaw*-type racial gerrymandering cases that did not involve claims of intentional discrimination,[105] but they do not argue that

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[105] *E.g.*, *Bush*, 517 U.S. at 968 (O'Connor, J.) (stating that, if the State's goal is otherwise constitutional political gerrymandering, it is free to use various kinds of specific political data to achieve that goal "regardless of its awareness of its racial implications").

these cases stand for the proposition that racial discrimination is valid so long as race and politics are highly correlated.

In that vein, the Court agrees with Defendants that statements made about determining motive in the *Shaw*-type cases can have application to intentional vote dilution cases, even though *Shaw*-type cases involve a different motive than intentional vote dilution cases. All parties agree that an intentional vote dilution and a *Shaw*-type racial gerrymandering case are analytically distinct. Nevertheless, Defendants correctly point out that both are based on the Equal Protection Clause and both are fundamentally based on the use of race in districting decisionmaking. In a *Shaw*-type claim, we are not concerned with discriminatory versus benevolent motive, only whether race was the predominant motive in the decisionmaking, while in an intentional vote dilution case, we look to see whether intentional racial discrimination was a motivating factor in the districting decision. Whether partisanship provides an explanation for the specific lines that were chosen is relevant to both motive inquiries. Thus, the Court disagrees with statements such as the NAACP's proposed conclusion of law 223 (docket no. 1281) that "correlation between party and race, such as that discussed in *Cromartie v. Easley*, 532 U.S. 234 (2001) and *Bush v. Vera*, 517 U.S. 952 (1996) is irrelevant in cases where vote dilution is alleged." *See LULAC v. Perry*, 548 U.S. 399, 515 (2006) (Scalia, J., dissenting) (citing *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999), a *Shaw*-type racial gerrymandering case, in the context of an intentional vote dilution claim analysis, for the proposition that "a jurisdiction may engage in constitutional political gerrymandering, even if it so

happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact") (emphasis in original).

Defendants, however, also mischaracterize Plaintiffs' argument as being that because most minority voters prefer Democratic candidates, intentionally protecting Republicans amounts to intentionally disfavoring minority voters. Docket no. 1272 at 18. Defendants also incorrectly argue that "Plaintiffs refuse to acknowledge any distinction between partisan and racial motivation." *Id.* at 20. Plaintiffs do not argue that partisan motivation favoring Republicans is automatically racially discriminatory motivation against minorities, who generally vote Democratic. Rather, they argue that Defendants intentionally discriminated on the basis of race to gain partisan advantage and protect incumbents, and that this constitutes racially discriminatory purpose.[106] *See, e.g.*, docket no. 1279 (United States Post-Trial Brief) at 14 ("The use of precinct splits is critical evidence that state officials used race as a proxy for

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[106] Defendants refer to the United States' argument that the Legislature's intentional decision not to create a minority opportunity district was intentional vote dilution to support their position that Plaintiffs are arguing that any decision not to create a Democratic district is intentional vote dilution. Docket no. 1272 at 22-23. However, the United States' position is that intentionally refusing to draw a minority district required by the VRA because it would be a Democratic district is intentional vote dilution in violation of § 2. The United States also argues that the mapdrawers went to great lengths to prevent the creation of minority districts by cracking and gerrymandering. TrA2151 (Mr. Mellett) ("you can't prevent a district from coming to be by cracking, packing, going to extraordinary lengths to make sure it does not occur, and that is what we are arguing is done here").

partisanship and that map drawers intentionally reduced minority political opportunity for a partisan political purpose in the 2011 Congressional and House plans.").

In addition, the Court agrees with Plaintiffs that they need not prove race-based hatred or outright racism, or that any particular legislator harbored racial animosity or ill-will towards minorities because of their race. *See McCrory*, 831 F.3d at 222-23, 233 (intentionally targeting a particular race's access to the franchise because its members predictably vote for a particular party is discriminatory purpose even absent any evidence of race-based hatred and despite the obvious political dynamics, and a finding of intentional discrimination does not mean that any member of the legislature harbored racial hatred or animosity toward any minority group); *Veasey*, 830 F.3d at 335-37 (Costa, J., dissenting in part) (a finding of discriminatory purpose is not tantamount to a finding of racist motivation). If the Republican-dominated Legislature targeted voters who, based on race, were unlikely to vote for Republicans, that constitutes racial discrimination even if done for partisan ends. *McCrory*, 831 F.3d at 233; *Veasey*, 830 F.3d at 336 (Costa, J., dissenting in part) ("That most basic of human instincts—self-preservation—can thus provide an explanation for enacting a law at least in part because it will have a disparate impact on protected groups that favor the out-of-power party.").

As Judge Kozinski explained in *Garza v. County of Los Angeles*, a finding of intentional discrimination is not a finding that legislators harbored any ethnic or racial animus, in terms of dislike, mistrust, hatred, or bigotry,

toward minority communities. He illustrated the point as follows:

> The lay reader might wonder if there can be intentional discrimination without an invidious motive. Indeed there can. A simple example may help illustrate the point. Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.

918 F.2d at 778 n.1 (Kozinski, J., concurring and dissenting in part). Thus, if the "desire for partisan advantage . . . leads a legislature to select 'a course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group,' that is enough." *Veasey*, 830 F.3d at 336 (Costa, J., dissenting in part) (citing *Garza*, 918 F.2d at 778 (Kozinski, J.)).

With these principles in mind, the Court turns to the issue of whether Plaintiffs have demonstrated that mapdrawers chose certain district lines *because* of race and with a racially discriminatory purpose. While there is certainly an overlap between cracking and packing Democrats and cracking and packing minorities, the

Court finds that Plaintiffs have satisfied their burden of showing that intentional minority vote dilution was a motivating factor in the drawing of district lines in DFW and that mapdrawers intentionally diluted minority voting strength in order to gain partisan advantage.

The Court has already found that the Republican-dominated Legislature viewed minority districts as Democrat districts and was generally unwilling to create any districts in which minority voters could elect their representatives of choice unless they felt compelled to do so by the VRA. The Court has further found that mapdrawers were willing to disadvantage minorities to gain partisan advantage, as was done in CD23, and that they were willing to use race to gain partisan advantage, as was done in drawing race-based CD35 in Travis County to destroy the Democrat district CD25 and limit the number of Democrat districts overall. Further, because the Republican-dominated Legislature and the mapdrawers felt that the VRA created and protected Democratic districts, they consistently took the most restrictive positions on the VRA.[107] Thus, the record

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[107] Mapdrawers and decisionmakers testified that a district that could potentially perform for minority voters in DFW, both Hispanic and African American, was viewed by mapdrawers and legislative decisionmakers as a "Democrat district." TrA351 (Interiano) (Congressman Smith's proposed district "would have simply been an additional Democratic district), TrA381 (Interiano) (unless required by the VRA, "we should not be giving a Democrat district"); TrA1604 (Downton) (according to conversations with Solomons, there were not votes to pass any plan that did not have three Republican districts out of four, but Smith's plan was a 2-2 Republican/Democrat district); TrA277 (Seliger) (minority districts were "without question" thought of as Democrat districts), TrA287 (stating that maps proposed by minority members that created a minority district in DFW were just

indicates not just a hostility toward Democrat districts, but a hostility to minority districts, and a willingness to use race for partisan advantage.

In addition, the evidence shows that mapdrawers were more than just "aware of" race; they often referred to race in discussing the drawing of districts, they paid close attention to the racial makeup of all districts, and they engaged in discussions about how to gain political advantage by disadvantaging Hispanic voters through use of the "nudge factor." *E.g.*, Tr912 (Downton) (mapdrawers "were always conscious of the [race] numbers, and so we would look at them throughout the process before moving forward with the map"); D-122 (Hanna memos on House proposals, which focused on percentages of racial minority populations within minority districts); US-75 (Opiela "nudge factor" email to Interiano and Lisa Kaufman proposing to manipulate

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designed simply for Democratic seats). Downton and other decisionmakers in the Republican-dominated legislature took the position that only a single majority-minority CVAP district would be required by § 2 despite the fact that Supreme Court precedent regarding coalition districts was unsettled, the Fifth Circuit had held that they could be required by § 2, and they had been advised by TLC lawyers that they could be required. D-590 at 85. In drawing the House plan, they had taken the position that the Texas County Line Rule would trump § 2 unless told otherwise by the courts to avoid drawing new minority districts, again against the advice of TLC lawyers. TrJ1208-09; D-590 at 38-39. In addition, there is no indication that mapdrawers or Republican leadership asked David Hanna for a VRA analysis of the proposed congressional plan even though they had for the House plan (and Seliger had stated at a hearing that maps would be scrutinized by Hanna), and they ignored concerns that were raised about VRA compliance (such as in CD23) that interfered with their partisan goals.

districts to increase Hispanic population metrics while keeping SSVR and Hispanic turnout low); US-76 (Opiela email to Lamar Smith and Interiano, later forwarded to Denise Davis, (Speaker Straus's Chief of Staff) referring to having to "pick up Anglo voters" "to avoid packing claims on Hispanic districts").[108] Although Opiela, who originally proposed the "nudge factor," may not have had as significant a role in the ultimate specific lines in the plan as Plaintiffs contend, he was undoubtedly an insider to the process—he was friends with mapdrawers; he was frequently in the office, even referred to as "frequent flier" by the committee clerk Bonnie Bruce; he made requests and gave input; and he engaged in numerous discussions with mapdrawers Downton and Interiano.

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[108] One Judge in *Veasey* found it notable that, despite being "granted wide-ranging and invasive discovery into potentially privileged internal correspondence of the Legislature," including email, plaintiffs in that case "uncovered not a single slip of the tongue or errant statement indicative of a racially discriminatory motive." *Veasey*, 830 F.3d at 287-88 (Jones, J., concurring in part and dissenting in part). The Court notes that, in this case, there are very few emails among Interiano, Downton, Solomons, Seliger, and Doug Davis concerning redistricting. The Court finds that these key players generally discussed redistricting in person and not by email, which explains the lack of email evidence. Downton repeatedly referred to discussions he had with Solomons and others, but few to none of these occurred by email. Solomons and others repeatedly referred to the fact that they were highly aware that the maps would end up in court, and the Court finds that they took intentional steps to avoid creating an email record of their discussions. *See* PL-311 (docket no. 324-3 at 55) (email expressing dissatisfaction with the fact that Dub Maines was criticizing the proposed plan in an email when it would likely end up in court, forwarded by Lamar Smith to Opiela and Interiano).

More importantly, Downton admitted that once the decision was made not to create a minority coalition district in DFW, it became more difficult to draw "strong" Republican districts,[109] and Downton and the other decisionmakers knew it would also be more difficult to maintain these districts as Republican across the decade as minority population continued to grow (and outpace Anglo growth). One way to solve this problem was to pack and crack minority voters.

Packing would be achieved by increasing the number of minority voters in the existing African-American opportunity district CD30 and moving Anglo voters out of CD30 and into the Republican districts, and the evidence demonstrates that this was in fact done. In Plan C185, all CD30 Hispanic and African-American population metrics increased from the benchmark: total African-American population increased from 42.4% to 45.6%, BVAP increased from 42.5% to 46.5%, and BCVAP increased from 49.8% to 53.1%; total Hispanic population increased from 39.7% to 40.3%, HVAP increased from 34.7% to 35.6%, and HCVAP increased from 19.8% to 20.6%. Anglo population metrics correspondingly decreased. Defendants contend that there is no evidence "that African-Americans were packed in District 30 in Plan

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[109] TrA1606 (Downton) ("One of the reasons the Republican congressional delegation proposed that [minority] district was because it protected all the incumbent congressmen by taking Democratic votes and concentrating them in a new district. It allowed the percentage of Republicans in the old districts to increase by nine. Drawing [Anglo-majority, Republican CD33 in Plan C185 instead], it became much harder to balance all of the existing districts with the new district, to where the congressmen felt that they still had strong Republican districts.").

C185 because the voting age population and citizen voting age population are largely the same as under Plan C100." Docket no. 1276 at 83 (proposed FF 772). Although it is true that minority population metrics are not drastically increased, they are increased.

Benchmark CD30 was slightly overpopulated (by approximately 8,000 persons), was at the 50% BCVAP threshold that Downton and mapdrawers had set for opportunity districts (it was 49.8% Black alone CVAP using 2005-2009 ACS data and 50.3% combined BCVAP), and was performing effectively and reliably for African-American voters. Therefore, no additional African-American population would have been needed to be added to CD30 to comply with the VRA.[110] Yet the district was changed significantly, without any input from Congresswoman Johnson or respect for the integrity of the district other than its racial composition.[111]

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[110] *See Bush v. Vera*, 517 U.S. 952, 983 (1996) (an increase from 35.1% to 50.9% African-American population was not narrowly tailored to comply with the VRA because there was no showing that it was necessary to ensure nonretrogression); *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 WL 3604029, at *17 (E.D. Va. June 5, 2015) (an increase in BVAP from 53.1% to 56.3% was not narrowly tailored where the district had been a safe majority-minority district for two decades). Downton and mapdrawers took the position that as long as a district was above 50% CVAP of a single minority, nothing else was required for § 2, and that § 5 compliance meant only that the relevant population metrics and election performance remained the same as in the benchmark plan. Thus, under their interpretation of the VRA, no increases in minority population would be necessary to comply with the VRA.

[111] Congresswoman Johnson testified in detail about the negative changes to her district, including the removal of her home, her office, and what she considered to be "economic engines." She and Dr.

A plan overlap analysis shows that 80.7% of the old CD30 population is included in the new district, and the new population taken from surrounding districts CD5, CD24, and CD32 is overwhelmingly minority. Of the approximately 6,000 persons taken from CD5, only 27.4% are Anglo.[112] Of the approximately 75,000 persons taken from CD24, only 25.7% are Anglo. And of the approximately 54,000 persons taken from CD32, only 16.5% are Anglo.[113] The population changes resulted in a decrease of 26,214 Anglos (25,677 of voting age), and a corresponding increase of 19,290 African-Americans (12,127 of voting age) in CD30.[114] Moreover, the contours of CD30 coincide with maximizing minority population; except for a few places in the north central portion of the district and the southeastern portion of the district, the boundaries consistently exclude heavily Anglo areas and include heavily minority areas.

Murray also expressed concerns about population changes to the district that could undermine its long-term status as an African-American district.

[112] Of the 31,000 persons moved into CD5 from CD30, 36.2% are Anglo.

[113] In contrast, of the approximately 68,000 persons moved from CD30 to CD32, 61.1% are Anglo. No population was moved from CD6 to CD30, but a large amount of Hispanic population (approximately 43,000 who were 82.5% Hispanic) was moved from CD30 to CD6. As discussed below, this is because CD6 was not in Dallas County in the benchmark, but in Plan C185 it reaches into Dallas County to take minority population.

[114] Although Hispanic total population increased by 1,157, HVAP actually declined by 1,810. However, as these voters became voting age, the HVAP of CD30 would increase over the decade. Further, the total Hispanic + African-American population increased by 20,147 and the combined voting age population by 10,219.

CD30 has 31 split precincts along its borders (three precincts are split twice, resulting in 34 total splits),[115] and the causes of these splits were generally unexplained by Downton or any defense witnesses. As noted, while accurate racial data is available below the precinct level, accurate political data is not, and any testimony that mapdrawers were not aware of this fact is not credible,[116]

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[115] To compare, the border of the lightning bolt in CD12 and CD26, where Downton admitted to using race, has 36 split precincts.

[116] The Court notes that Downton claimed to have studied redistricting law, and he surely would have studied *Bush v. Vera*, 517 U.S. 952 (1996), one of the more recent Supreme Court cases involving Texas redistricting.In that case, Justice O'Connor expressly noted that RedAppl "contained racial data at the block-by-block level, whereas other data, such as party registration and past voting statistics, were only available at the level of voter tabulation districts (which approximate election precincts)." *Id.* at 961. Further, the TLC's publication *Data for Redistricting* noted this limitation, and emails from TLC providing information noted this limitation in the data. PL-728 (Data for Redistricting publication) at 11-12; US-185 (email from Davenport of TLC to Interiano noting allocation issues). Thus, it is simply not credible that Downton or other mapdrawers were unaware of this fact.

In addition, Downton's testimony that he did not worry about splitting precincts because there was no policy against it is also unconvincing. If split precincts were not an issue, then Solomons would not have used split precincts to argue against minority members' proposed changes, and members would not have been told to avoid splitting precincts when drawing the House map. Rep. Pickett of the El Paso delegation testified that they were told not to split precincts. Downton claimed this was so that the members' pieces could be fit together more easily in the House map, but this explanation makes no sense with regard to counties such as El Paso, which were going to be "dropped in" to the House map. Downton knew that splitting precincts was disfavored and that accurate

suggesting that many precinct splits have a racial basis. *See Bush*, 517 U.S. at 961-62 (O'Connor, J.) (noting that the availability of block-level racial data "enabled districters to make more intricate refinements on the basis of race than on the basis of other demographic information"). Dr. Arrington's split precinct analysis indicates that although split precincts included more voting-age Anglos in CD30 than were excluded, this was *more true* for Hispanics and African-Americans.[117]

Defendants contend that the allegations concerning split precincts "rest on speculation and factual misstatements." Docket no. 1272 at 35. Defendants concede that accurate political data was not available at the precinct level, but note that RedAppl statistics nevertheless reflected changes in political data when precincts were split. Defendants also state that precincts may be split, and were split, for non-racial reasons, such as following city boundaries, including financial supporters, following roads, incorporating airports and government buildings, including a member's home, and complying with the Texas Election Code. *Id.* at 36. They assert that, to the extent any precincts were split on the basis of race, it was only to comply with the VRA. *Id.*

However, neither Downton (nor anyone else) ever explained why the population metrics of CD30 were

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political data was not available, yet split precincts anyway, indicating the use of racial data to do so.

[117] In CD30, 4,250 BVAP individuals were excluded in split precincts, while 17,192 were included. US-352 (Arrington Decl.) at 56, Table 21. 17,358 HVAP individuals were excluded, while 25,502 were included. *Id.* 11,947 Anglo VAP were excluded, while 17,535 were included. *Id.*

changed in the way that they were or why these 31 precincts were split.[118] He testified that each time he made changes in an area, he split precincts to equalize population, so that there might be a lot of split precincts in an area that he worked on more regularly (such as Tarrant County). TrA1718. But there were not so many changes in this portion of the map as it progressed that the numerous splits could be explained simply by repeated population equalization, nor have Defendants shown that the splits were in fact caused by neutral reasons, other than providing generalities and speculation.[119] Thus, the evidence indicates that the splits were likely race-based, and Defendants fail to proffer a non-racial basis for the numerous precinct splits in CD30.

Further, Downton's testimony is consistent with a racial packing motive— he testified that he was trying to maintain all the existing Republican Dallas districts at a certain Republican percentage, and packing minorities into CD30 while removing Anglo (and thus presumably Republican) voters and placing them into adjacent districts is consistent with that stated goal. Plaintiffs have

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[118] Downton testified that mapdrawers "tried to make sure we were maintaining levels of HCVAP in the Hispanic districts and black voting age population in the black districts," Tr914 (Downton), and never indicated that there would have been a need to increase the minority population in CD30.

[119] CD30 did not change much between the time of the initial Solomons Plan C125 and the enacted plan. Therefore, any splits due to "zeroing out" caused by changes to the districts would have had to exist in Plan C125. The Court is not aware of any split precinct reports in the record that would show the progression of split precincts in the map as it was developed before Plan C125 was released that might support Downton's explanation.

shown that minorities were moved into CD30 and Anglos were removed, and Defendants have not pointed to any evidence showing that Democrats (who happened to be minorities) were packed into CD30 while Republicans (who happened to be Anglos) were removed. Thus, CD30 demonstrates a classic racial gerrymandering technique of packing minority voters into CD30 to waste their votes, while moving Anglos into neighboring districts to increase their Republican performance. The Court finds that race was used as a proxy for political affiliation, and that this was done intentionally to dilute minority voting strength.

To support their claim that minority populations in DFW were otherwise intentionally cracked, Plaintiffs point to the bizarre shapes of the districts and the numerous split precincts in the various DFW districts.[120] The Court agrees that the bizarre shapes and the numerous split precincts, which indicate the use of racial data, support an inference that the mapdrawers intentionally used racial criteria to split the minority population.[121]

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[120] MALC asserts that overlays of districts 12, 26, 6, and 33 with minority population concentrations show "that the jagged and extremely odd shapes were used to gather minority populations and place them into Anglo-dominated congressional districts." Docket no. 1275 at 36 (proposed FF 188). The Task Force argues that the lines more closely track race than partisanship. TrA2134-35 (Ms. Perales). As discussed above, mapdrawers admit that the lines of CD12 and CD26 are partly based on race.

[121] The Court acknowledges that while bizarre shapes are evidence of gerrymandering, they may be evidence of political gerrymandering and not necessarily racial gerrymandering. However, considering all the evidence, including the precinct splits and the map progression (discussed *infra*), the Court finds that the bizarre shapes are at least in part due to racial gerrymandering.

More importantly, however, expert George Korbel noted that the map looked as though mapdrawers started out with the district they wanted to avoid, and then carved it up into pieces, Tr669, and the progression of the maps in Downton's RedAppl account bears this out. Plan hrc1C109 from late April contains the same proposed minority coalition district from a map provided by Opiela on behalf of the delegation (hrc1C104). Plan hrc1C116 ("labeled Congressional 5/3") still contains a possible minority coalition district (CD33), though modified somewhat from Opiela's district (Downton stated that he modified the delegation's district to try to get it above 50% HCVAP), and then hrc1C119 returns to the delegation's proposed district (or a district substantially similar to it). By hrc1C124, however, DFW begins to take its final shape, and the minority coalition district is removed, now divided up (cracked) primarily among CD6, CD12, CD26, and CD33.[122]

The CD26 extension from Denton County is extended and now includes a significant portion of what had been in

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Further, although there are some precinct splits with obvious non-racial explanations, such as tracking the boundaries of cities (this appears to be the case with respect to the cities of Southlake, Grapevine, Lewisville, and Coppell along the southern portion of Denton County, as well as the boundaries of CD12 along North Richland Hills), most of the district lines in Dallas County do not appear to particularly follow city boundaries or have obvious non-racial bases.

[122] The Court notes that Defendants had offered an exhibit (D-509) of maps and reports for each of the congressional plans in the hrc1 account, but later withdrew this exhibit. United States exhibit 731 contains shapefiles of the plans discussed here, and the Task Force has submitted exhibits showing some of the shapefiles as well.

the minority district, including what Downton referred to as the northern Fort Worth Hispanic community. CD12 and CD33 then take the other portions of what had been in the minority district in Tarrant County, including what Downton referred to as the southern Fort Worth Hispanic community, and CD6 shifts east into Dallas County to take a large portion of the former proposed minority district within that county. CD24 remains largely the same, as do portions of the border between CD30 and CD32, indicating that this was not a new map drawn from scratch, but a modification of the prior map that essentially dismantled the minority district.[123] The fact that the minority district was drawn and then cracked is demonstrated by overlapping the maps as follows:

This contradicts Defendants' assertion that once Downton determined that he could not draw a 50%-HCVAP district, he simply drew districts based on partisan criteria. The progression of his maps demonstrates that he included a minority district in the map, then cracked it into Anglo-majority districts. This is consistent with a motive to disadvantage minorities, not Democrats.

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[123] This configuration remains in hrc1C130 ("Congressional Ryan Merge 5/20") (PL-1134), and then further modifications are made to include the Trinity River Project and North Richland Hills in CD12 in hrc1C131 ("Congressional Ryan Merge 5/23") (PL-1135). Thus, while the Trinity River Project and inclusion of North Richland Hills in CD12 did help shape the final district configurations in Tarrant County, Downton initially cracked the proposed minority district before making these adjustments.

Moreover, it is consistent with a motive to crack and limit *minority* population within the Republican districts to curb the effect of continued minority growth (in contrast to Anglo decline or stagnant growth) throughout the decade—to keep the districts "safe" Republican districts as long as possible. Downton cracked minority populations, not just Democrat populations, and dispersed them within Anglo-dominated districts to account for future growth, to ensure that the minority populations would not grow sufficiently to control the district for as long as possible. Thus, the mapdrawing process itself demonstrates cracking of minority populations to disadvantage minority voters.

The Court finds that this evidence persuasively demonstrates that mapdrawers intentionally packed and cracked on the basis of race (using race as a proxy for voting behavior) with the intent to dilute minority voting strength. The Court also finds that the *Arlington Heights* factors further buttress a conclusion of intentional discrimination.

Defendants argue that none of the *Arlington Heights* factors are established or point to a finding of intentional racial discrimination, and contend that Plaintiffs improperly view the factors as boxes to be checked to

prove their claim or as establishing a *prima facie* case. However, the *Arlington Heights* factors are permissible areas of inquiry, that when viewed in totality with other evidence in the record, may provide an inference of racial discrimination, given that government actors will rarely provide direct evidence of discrimination. *See Hunt v. Cromartie*, 526 U.S. t541, 553 (1999) (noting that outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence); *Veasey*, 830 F.3d at 230 n.12 ("[W]e have noted that discriminatory intent . . . may be shown through circumstantial evidence, as discriminatory motives are often 'cleverly cloaked in the guise of propriety.'").[124]

The Supreme Court has stated that *Arlington Heights* provides guidance for assessing a jurisdiction's motive in enacting voting changes and "set[s] forth a framework for analyzing 'whether invidious discriminatory purpose was a motivating factor' in a government body's decisionmaking." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997).[125] Consideration of the *Arlington Heights* factors, when viewed in totality with the entire record evidence, may support a finding of intentional

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[124] As the Fourth Circuit recently recognized, such a holistic inquiry is particularly important today, where discrimination is achieved more subtly and through more sophisticated devices. *McCrory*, 831 F.3d at 221; *see also Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) (noting the "demonstrated ingenuity of state and local governments in hobbling minority voting power" as "jurisdictions have substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices").

[125] In *Reno*, the Supreme Court referred to *Arlington Heights* as establishing both a "framework" and a "test" for evaluating purpose. *Reno*, 520 U.S. at 488-89, 490.

racial discrimination, even where the individual factors considered alone are not compelling. *McCrory*, 831 F.3d at 233 (district court erred by considering each piece of evidence in a vacuum rather than engaging in the totality of the circumstances analysis because "[a]ny individual piece of evidence can seem innocuous when viewed alone, but gains an entirely different meaning when considered in context"). Thus, the Court rejects Defendants' attempt to limit the analysis to each individual factor in isolation.

Concerning the impact of the plan, Plaintiffs rely heavily on the fact that, despite the overwhelming and concentrated minority population growth and the decline in Anglo population in the DFW area, no new minority opportunity districts were drawn.[126] Further, minority voters' share of statewide proportional representation actually decreased. Plaintiffs argue that "[t]he only way the minority community would lose their proportion of seats is if a purposeful series of decisions were made to the detriment of the minority community" and "that is exactly what happened." Docket no. 1228 (MALC closing argument summary) at 4. Dr. Ansolabahere noted that Plan C185 "falls short of what might reasonably have been expected for Hispanic and black representation following

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[126] Plaintiffs note that the combined total population of Dallas and Tarrant Counties roughly equals Harris County's total population and the combined African-American and Latino population of Dallas and Tarrant Counties is nearly the same as in Harris County, yet Harris County has three minority opportunity districts while the DFW area only has one. *See, e.g.*, docket no. 1277 at 58. Because the Harris County African-American districts (CD9 and CD18) already existed, mapdrawers felt they had to maintain them to avoid retrogression under § 5 even though they were not BCVAP-majority districts using available CVAP data.

the 2010 Census and reapportionment." Joint Expert Ex. E-15 at 5.[127]

All of the population growth in Dallas County was attributable to minorities, since Anglo population actually declined by about 200,000, yet this is not reflected in Plan C185. Under Plan C100, CD24, 30, and 32 had a majority of their population in Dallas County, and CD5 had a plurality. Anglos controlled all of the districts except CD30 (3 of 4). Under Plan C185, Dallas residents are the majority of the population in CD6, 30, and 32, and are a plurality in CD5 and 24 (Ansolabahere considers these the five Dallas districts). Joint Expert Ex. E-15 (Ansolabahere report) at 22. Anglos are majority or plurality in all of the districts except CD30 (4 of 5) even though they are now only about 33% of Dallas County's population. *Id.* at 22-23. Thus, the minority group has a majority of seats. *Id.* African-Americans were and remain the plurality in CD30. *Id.* Hispanics, who are a plurality of the county's population (38%), are the plurality or majority in no districts. Ansolabahere report (Joint Expert Ex. E-15) at 22, Table 7 (depo. at 84). 90% of Anglos in Dallas County live in districts in which their race is the majority, compared to 58% of African Americans and 0% of Hispanics. *Id.* at 23.

In Tarrant County, Anglos are approximately 52% of the County population but are the majority in both districts that are based in Tarrant County, as well as the four districts that take some part of Tarrant County. *Id.*

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[127] Dr. Ansolabahere found that, statewide, Plan C185 *reduced* the number of African Americans and Hispanics in minority ability-to-elect districts by 781,408 persons. Rod-914 (January 2012 Report) at 31.

at 24. None of the 270,000 African Americans (who are 14% of the population) or the 480,000 Hispanics (who are 27% of the population) are in a district in which they are a plurality or majority. *Id.*

Although Defendants contend that Plaintiffs are asserting a proportionality argument and that § 2 expressly provides that it does not create a right to proportional representation, Defendants again mischaracterize Plaintiffs' argument. Plaintiffs are not asserting a right to proportional representation, but are instead arguing that the failure to increase (and in fact creating a plan that results in a *decrease* in) proportional representation despite the minority population growth and the decline in Anglo growth, is evidence of intentional discrimination and purposeful dilution. *E.g.*, docket no. 1282 (Task Force Post-Trial Brief) at 68 ("In the face of shifting demographics, and the increase in the number of Latino eligible voters in Texas from 2000 to 2010, the State's refusal to create additional Latino opportunity congressional districts is circumstantial evidence of an intent to limit Latino electoral strength in the new redistricting plans."); docket no. 1279 (United States Post-Trial Brief) at 15-16 (the most relevant circumstantial evidence of discriminatory purpose is the fact that despite massive minority population growth responsible for Texas gaining four seats, Texas did not create any new minority opportunity though it easily could have done so). On that issue, the law is clear that "the impact of the official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions." *Reno*,, 520 U.S. at 488. "[A] jurisdiction that enacts a plan having a dilutive impact is more likely to have acted with a

discriminatory intent to dilute minority voting strength than a jurisdiction whose plan has no such impact." *Id.*; *see also Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994) ("One may suspect vote dilution from political famine . . . .").

Besides the fact that proportionality is always a relevant consideration in a § 2 vote dilution analysis and lack of proportionality is probative evidence of vote dilution, *De Grandy*, 512 U.S. at 1025 (O'Connor, J., concurring), the effect on proportional representation is also relevant to determining whether the plan bears more heavily on minorities than Anglos. *See Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 315 (D. Mass. 2004) (noting that "[i]n the face of a burgeoning minority population, this sort of [proportional] retrogression counts in the plaintiffs' favor"). The United States contends that Plan C185 is more dilutive than the benchmark plan because it widened the representation gap. Docket no. 1279 at 16-17. The United States argues that Hispanic and African-American citizens make up about 38.2% of the State's CVAP (using 2006-2010 ACS data), such that proportionality would be 12/32 districts in Plan C100 and 14/36 districts in Plan C185. *Id.* at 17. Because there were ten opportunity districts in the benchmark plan and there remain ten opportunity districts in Plan C185, the United States argues that the representation gap increased from two to four, thereby further diluting minority voting strength. *Id.* The District Court for the District of Columbia agreed with the concept of this argument in the § 5 preclearance litigation when it found the plan to have a retrogressive effect and

denied preclearance.[128] *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013). It found:

> [T]he representation gap in Texas has increased. The Black and Hispanic communities currently make up 39.3% of Texas's CVAP. Joint Stipulations of Fact ¶ 38. Thus, if districts were allocated proportionally, there would be 13 minority districts out of the 32 in the benchmark (39.3% of 32 is 12.6). Yet minorities have only 10 seats in the benchmark, so the representation gap is three districts. In the enacted plan, proportional representation would yield 14 ability districts (39.3% of 36 is 14.1), but there are still only 10 ability districts. Thus, the representation gap in the enacted plan is four districts. Because this gap increases by one district, we cannot preclear the enacted plan.

Id. at 158 (footnotes omitted). This Court also agrees.

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[128] The majority in *Veasey v. Abbott*, 830 F.3d 216, 240 (5th Cir. 2016) noted that the "same Legislature that passed SB 14 also passed two laws found to be passed with discriminatory purpose," citing the D.C. District Court's decision on § 5 preclearance of these maps in *Texas v. United States*, 887 F. Supp. 2d 133, 159-66 (D.D.C. 2012), even though this opinion was vacated pursuant to *Shelby County*. In response to the dissent's attempt to "discredit" the case because it was vacated, the Fifth Circuit majority noted that "the opinion was not vacated on the merits and remains factually relevant as a contemporary example of State-sponsored discrimination based on the finding of a three-judge federal court." *Id.* at 257 n.54. Thus, the Court finds that the D.C. Court's conclusions under its § 5 analysis may be considered in this case.

Further, although Hispanic populations are sufficiently concentrated that most are placed in Hispanic-majority districts in South and West Texas in Plan C185, minorities and Anglos are treated quite differently in Plan C185 overall, with many Hispanics stranded in Anglo-majority districts. In Plan C185, White non-Hispanics of voting age are overwhelmingly placed in districts in which the majority are White non-Hispanics: 83% of White non-Hispanics reside in districts where a majority of the population is White non-Hispanic of voting age, and 88% live in districts in which a majority or plurality are White non-Hispanics. Ansolabahere Report (Joint Expert Ex. E-15) at 14-15.

In comparison, minority voters are treated quite differently. *Id.* at 15. Although there are three million African-Americans (12% of the State's population), there are no majority-Black districts in terms of voting age population, and only 21% of the Black voting age population is in a Black-plurality VAP district. *Id.* at 15-16. Forty-four percent of Hispanics live in districts that are majority-Hispanic, while 47% live in districts with a White-majority VAP. *Id.* at 16 Thus, White non-Hispanics, who are 45% of the total population, hold clear majorities in 70% of districts and have opportunities to win 70% of seats, while African-Americans and Hispanics, who are 48% of the State's population, are pluralities or majorities in just 30% of districts. *Id.* at 16-17. This presents a differential opportunity to elect, and it is not explained by having to put more Hispanics into districts to create majority-HCVAP districts. *Id.* at 17. Hispanics of voting age are dispersed into Anglo districts more than Anglos of voting age are dispersed into non-Anglo districts such that nearly three times as many Hispanics

are stranded in districts in which they are the minority. *Id.* at 18-19. As a result, proportionality of representation is lacking statewide. *De Grandy*, 512 U.S. at 1025 (O'Connor, J., concurring) (lack of proportionality is probative evidence of vote dilution and is always relevant).

Regarding the historical background of the plan, Plaintiffs offered expert and lay witness testimony concerning Texas's long history of discrimination with regard to voting and in general. *See also Bush v. Vera*, 517 U.S. 952, 981 (1996) (noting parties' reliance on "Texas' long history of discrimination against minorities in electoral processes, stretching from the Reconstruction to modern times, including violations of the Constitution and of the VRA"). The parties take divergent views of the importance of this factor. Citing *Arlington Heights*, the Fifth Circuit recently noted that "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes," but unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value. *Veasey*, 830 F.3d at 232. Defendants seek to cast most of Texas's history of racial discrimination as ancient history.

The Court finds it unnecessary to rely on evidence of long-past State-sponsored discrimination to find discrimination here. But the Court agrees with the Fourth Circuit in *McCrory* and the Fifth Circuit in *Veasey* that the state's history of race discrimination and violations of the VRA, coupled with other evidence, is relevant to providing context. *Veasey*, 830 F.3d at 232 n.14 ("history (even 'long-ago history') provides context to modern-day events"); *McCrory*, 831 F.3d at 223-24. In this regard, the Court notes the Fifth Circuit recognized that restrictive

and discriminatory voting laws have typically been enacted (by *both* political parties) in response to a perception of increased voting power by emerging demographic groups. *See Veasey*, 830 F.3d at 331 & n.10 (Costa, J., dissenting in part); *see also Veasey*, 830 F.3d at 241 n.30 (noting the testimony of Dr. Burton that every time African-Americans had been perceived to be increasing their ability to vote and participate, there has been State legislation to deny them the vote, dilute the vote, or make it more difficult for them to participate on an equal basis as White voters); TrA532 (Flores) (noting that both Republicans and Democrats have discriminated against minorities because they are unsure of how they will vote and therefore try to control it); TrJ1228 (Thompson) (both Democrats and Republicans have engaged in voting rights violations that had to be remedied in court).

With regard to more recent instances of voting discrimination, the Fifth Circuit stated in *Veasey* that *LULAC v. Perry* does not lend support for a finding of "relatively recent" discrimination because the Court relied on the history of discrimination as a context for the disenfranchisement of voters who had grown disaffected by the Republican incumbent, but "did not base its decision on a conclusion that the legislature intentionally discriminated based upon ethnicity." 830 F.3d at 233. However, this seems to overlook the fact that the Supreme Court noted that Texas's actions "bore the mark of intentional discrimination" even though that was not ultimately its holding. See LULAC, 548 U.S. at 440. The actions that "bore the mark of intentional discrimination" in *LULAC v. Perry* were carried out in 2003 by the Republican-dominated Legislature, and are similar to the

actions Plaintiffs complain were taken in 2011 with regard to CD23 and CD27.

Regarding the sequence of events leading up to the challenged decision, the Texas Legislature enacted its 2011 redistricting plans in the context of strong racial tension and heated debate about Latinos, Spanish-speaking people, undocumented immigration and sanctuary cities, and the contentious voter ID law. Tr810-12 (Turner) (it was a tough session with a lot of tension around voter ID and the early voting absentee bill and their impact on minority voters); TrA262 (Seliger) (the 2011 session involved voter ID, redistricting, and sanctuary cities, which are all "racially charged"); Tr436 (Flores), Joint Expert Ex. E-8 at 6 (the 2011 session was the most racially acrimonious he had seen and it seemed Hispanics and Spanish speakers were targeted); Tr437-38 (Flores) (stating that he observed a video of an individual trying to give testimony in Spanish through an interpreter to the Transportation Committee and one of the Senators interrupted him and said it was insult that he was speaking in Spanish rather than English).

Plaintiffs contend that the process of enacting the map was exclusionary/secretive and was unnecessarily rushed, with little opportunity for public input or meaningful amendments, and that this is further circumstantial evidence of improper motive. Although David Hanna testified that he did not feel the process was particularly or unusually rushed, TrA1557, and Defendants contend that Plaintiffs have not identified an objective standard to determine whether this process was "rushed" (docket no. 1272 at 39-40), the timeline speaks for itself.

Although the interim field hearings may have succeeded in notifying the public about upcoming

redistricting, they were of limited usefulness in terms of obtaining meaningful public input for legislators, and there is little indication that the 82nd Legislature or the mapdrawers paid much attention to the public testimony received at these hearings. No congressional maps were proposed during the regular session. Once Plan C125 was made public, the map essentially passed in sixteen days.

The initial proposal was drawn largely in secret by Downton in consultation with Solomons, Seliger, Doug Davis, Interiano, and Republican congressional and Texas House insiders. Even Senate redistricting committee lawyers were not shown the plan before it was released. D-602 at ECF 126, 140-41. Senator Seliger admitted that no minority member of the Senate was involved in drawing the plan. TrA256-57. Minority members of the house and senate redistricting *committees* were generally shut out of the mapdrawing process. Although mapdrawers obtained and relied on data such as the RPVAs and OAG 10 analyses from the OAG, this data was not shared with minority members of the Legislature or even the redistricting committee.[129]

When Plan C125 was released on May 31, hearings were set on June 2 and June 3, and a new Plan C130 was released before the June 3 hearing. This was a very short

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[129] Defendants assert that it should come as no surprise that Democrat members did not have influence on the process, given that they were outnumbered two-to-one in the House. Docket no. 1272 at 48. Defendants also argue that Democrats were kept out of the process because they constantly threatened litigation and refused to support the final plan for fear of weakening their litigation position. *Id.* at 45, 48-49. However, if mapdrawers were truly concerned with complying with the VRA and avoiding litigation, an open process would seem more conducive to that end.

preparation time for hearings, which made it difficult for minority groups to organize to review the maps and prepare comments and proposed alternatives. There was no meaningful debate over minority-proposed plans, and few minority-proposed changes were given meaningful consideration or adopted, only those that did not enhance minority ability or increase the number of minority opportunity districts.[130]

"This hurried pace, of course, strongly suggests an attempt to avoid in-depth scrutiny." *McCrory*, 831 F.3d at 228. Although Defendants note that there was no point of order raised and they were operating within the time limits of the special session, "a legislature need not break its own rules to engage in unusual procedures." *Id.* Further, Defendants assert that Plaintiffs cannot gain traction on this factor because they point to no "normal" procedure from which the Legislature departed in passing this bill, *see* docket no. 1272 at 39, to which Plaintiffs respond that there has been no "normal" benchmark procedure to point to that did not involve violations of the VRA.

Defendants contend that the fact that the process was secretive is not evidence of discriminatory intent "because Plaintiffs have not established that the 2011 redistricting process was any more secretive than previous redistricting legislation, or any legislation for that matter." Docket no. 1272 at 46. However, we examine the

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[130] For example, Defendants argue and the record supports a finding that the Hispanic population of CD20 was increased to bolster its performance at the request of minority legislators, but this was in response to retrogression concerns under § 5 and did not affect the partisan balance of the map.

process to glean insight into whether there was discriminatory purpose, and the inquiry is not limited solely to comparing this process to prior processes for deviations. In this case, the rushed and secretive process suggests that Defendants did want to avoid scrutiny of whether their efforts in fact complied with the VRA or were intended to do so, or whether they were only creating a facade of compliance.[131] Solomons made misleading comments from the floor, such as that he had not seen a congressional map proposal from Congressman Lamar Smith, that CD6 in DFW was a minority coalition district, and that changes were made to CD23 to maintain its performance.[132] A rushed process provided less time for minorities to evaluate the plans or to learn that Smith and other Republican leaders were proposing a minority district in DFW.

Legislators' comments that the short-time frame necessitated such a rushed process, while facially valid, were also pretextual in some regards. Unlike with the House map, there was no impending LRB deadline. The Governor could have called a second or third special session if the map was not passed during the first special session. Though Defendants imply that would have

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[131] Defendants' argument that "the supposedly inadequate time for public input cannot support a claim of racial discrimination because it affected all members of the public equally" (docket no. 1272 at 41) misunderstands this factor. Plaintiffs are not arguing that the rushed process itself was a discriminatory act; they argue that it is circumstantial evidence of improper motive.

[132] In addition, although Defendants now state that they rejected maps that included a DFW district because it would have been a Democrat district, this was not the reason given for rejecting and moving to table maps during debates.

caused extra delay, they chose to go to the D.C. Court for preclearance, which they knew to be slower, indicating that delay was not their true concern. Extending the process even a few extra days would not have derailed the plan, but might have afforded minorities a more meaningful opportunity to examine proposed maps and engage in actual debate, rather than having all their proposed maps tabled without any meaningful debate.

Although these factors are not dispositive on their own, they provide additional pieces of support concerning motivation. The exclusion of minority member and public input despite the minority population growth, the misleading information, the secrecy and closed process, and the rushed process, all support an inference that steps were taken to undermine minority voting strength to obtain partisan advantage. Combined with the other evidence in this case, the Court finds that Plaintiffs have established that Defendants acted at least in part with a racially discriminatory motive in enacting Plan C185, and with regard to the districts in DFW in particular. Defendants have failed to show that the same lines would have been drawn in DFW or that minorities would not have been packed and cracked without this racial motive.

With regard to effects, packing and cracking is an effective dilution technique that had the intended effect in DFW. Minority votes are wasted in CD30, and elsewhere minorities are kept at levels in which they cannot elect representatives of their choice. The Court has already found that Plaintiffs do not need to satisfy the 50% CVAP requirement, and the Court finds that there is racially

polarized voting in Dallas and Tarrant Counties.[183] Except for the existing African-American district CD30, minorities have been consistently unable to elect candidates of their choice to the United States House in the DFW districts. The Court also heard evidence that Anglo Representatives elected in those districts have been unresponsive to their needs. The record sufficiently demonstrates dilutive effect. Accordingly, the Court finds that the districts in DFW are invalid because they violate § 2 and the Fourteenth Amendment.

III. Houston area claims

Plaintiffs bring § 2 intent and results claims in the Houston area, as well as intentional vote dilution claims under the Fourteenth Amendment. Plaintiffs complain that, despite the minority growth in the area, Plan C185 maintains the same number of minority opportunity districts (three) as the benchmark plan, when an additional minority district could have been drawn. Plaintiffs further argue that the failure to create more minority opportunity was the result of intentional vote dilution in violation of § 2 and the Fourteenth Amendment.

A. Section 2 Results Claims

The benchmark plan C100 had three minority districts in Harris County, one Hispanic and two African-American. CD29 (wholly within Harris County) was a Latino opportunity district (56% HCVAP using 2005-2009

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[183] Defendants conceded the existence of racially polarized voting in DFW. Dr. Engstrom found racially polarized voting in Dallas and Tarrant Counties. Docket no. 307-1 (Engstrom Corr. Rebuttal Report) at 12-15, 18-21, Tables 5 & 7.

ACS data), and was represented by Gene Green (Anglo, Democrat). CD9 (in Harris and Fort Bend Counties) and CD18 (wholly within Harris County) were considered to be African-American districts that consistently elected minority candidates of choice. CD9 was 38.9% HVAP, 36.3% BVAP, 12.6% Anglo VAP, 48.2% Black alone CVAP, and 48.4% combined BCVAP, and was represented by Al Green (African American, Democrat). CD18 was 39% HVAP, 37.9% BVAP, and 19.3% Anglo VAP, 46.4% Black alone CVAP, and 46.7% combined BCVAP, and has been represented by Sheila Jackson Lee (African American, Democrat) since 1994. Although the African-American districts were not quite at the 50% BCVAP threshold set by mapdrawers for § 2-required opportunity districts, mapdrawers felt these were ability-to-elect districts that had to be maintained under § 5.

All the population growth in the Houston area was attributable to minorities. At the Houston field hearing, many witnesses testified about the minority growth and asked for an additional Latino district to be drawn there. Expert witness Richard Murray noted that the minority growth tended to be in the same areas (eastern half of Fort Bend County and southwest Harris County), and opined that it would be easy to create a second district (in addition to CD29) that would give Latino voters an opportunity to elect while maintaining African-American opportunity districts CD9 and CD18. Joint Expert Ex. E-4 at 27.

Despite the Latino population growth in the Houston area, no new Latino or coalition opportunity district was created there. Defendants contend that a new Latino opportunity district could not be drawn in Harris County without retrogressing the existing Latino district CD29

below 50% HCVAP, and thus no new Latino district was required (and Defendants continue to assert that minority coalition districts are never required by § 2). *See* docket no. 1276 at 81 (proposed FF 741); TrA1593 (Downton); Downton 8-12-11 depo. (Joint Ex. J-62) at 73 (Downton testified that he tried to draw an additional Latino opportunity district in Harris County (using a 50% HCVAP standard), but could not without retrogressing CD29 (reducing its HCVAP below 50% HCVAP)).

Plan C185 retained the two African-American (CD9, CD18) districts and one Latino opportunity district (CD29) from Plan C100, though certain Plaintiffs contend that changes were made to the African-American districts that weaken them in terms of removing economic engines and creating "tension" between Latino and African-American voters in the districts. In Plan C185, CD29 is 56.3% HCVAP (and 16.3% BCVAP) using 2005-2009 ACS data. CD9 is 47.7% combined BCVAP (and 18.3% HCVAP), and CD18 is 48.9% combined BCVAP (and 17.4% HCVAP). A new district, CD36, was added in the area, but it and all the other Houston-area districts are majority-Anglo CVAP and do not provide minority opportunity to elect. TrA1498, TrA1505 (Murray) (new CD36 is an Anglo-dominated, Republican district).

Plaintiffs point to various plans that were submitted during the legislative session and as demonstration maps in this litigation to support their argument that an additional minority district should have been drawn in the Houston/Harris County area, and that the failure to do so resulted in vote dilution. *E.g.*, docket no. 1279 (United States Post-Trial Brief) at 19 n.10 ("Alternative plans created an additional minority opportunity district in

Harris County.")[134]; Tr93-94 (Martinez Fischer) (MALC contends that demonstration plans C163, C164, C187, and C188 all created one additional opportunity district in Houston). Although certain Plaintiffs have issues with the districts as drawn, which are discussed in the context of the claims brought by the African-American Congresspersons, they do not challenge any of the Houston-area minority districts as not being opportunity districts. Rather, their claim is that four minority opportunity districts were required by § 2. Thus, the Court concludes that the rule of *De Grandy* applies, and that Plaintiffs must demonstrate that four compact majority-CVAP districts were required by § 2. *See De Grandy*, 512 U.S. at 1008 ("When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice.").

Given this Court's conclusion that Plaintiffs may satisfy *Gingles* through the use of minority coalition districts with a combined minority CVAP over 50%, the

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[134] The Court notes that the United States' proposed fact finding 241 states that it was possible to create an additional Hispanic opportunity district in Harris County and cites MALC Proposed Plan C211. Docket no. 1278 at 51. But Plan C211 largely retains the Harris County configuration from Plan C185. That same proposed fact finding also cites David Hanna's testimony from the July 2014 House trial (though the cited page number is incorrect), but the Court notes that Hanna testified that it was possible to create another minority district in Harris County in the Texas House plan, not the Congressional plan. TrJ1206-07.

Court must reject Defendants' argument that reducing the HCVAP of CD29 below 50% (when its combined CVAP remains above 50%, converting it from a Latino-majority opportunity district to a coalition district) would be retrogressive and violate § 5 (or would create problems under § 2 in terms of the number of minority-majority-CVAP districts). Creating four opportunity districts instead of three would not be retrogressive, and this is yet another example where Defendants took the most restrictive position on the VRA to avoid creating any new opportunity districts. Further, Defendants improperly focused only on maintaining existing population percentages as the measure of retrogression, and pretextually used their professed compliance with the VRA to avoid creating new minority opportunity districts. Defendants do not seriously assert that they would have been denied preclearance or sued under the VRA for creating *more* minority opportunity districts.[185] Nevertheless, the Court concludes that Plaintiffs have failed to proffer sufficient evidence demonstrating that four compact majority-minority coalition districts were required by § 2.

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[185] To the extent Defendants would assert that they could not intentionally draw a fourth minority opportunity district without being subject to a possible *Shaw*-type challenge, the Court does not hold today that Defendants were required to draw four minority opportunity districts in Houston. Nor does the Court hold that Defendants had to try to draw four minority opportunity districts. The Court holds only that the VRA did not prevent Defendants from allowing there to be more minority opportunity districts, as Defendants apparently assert by arguing that CD29 HCVAP "retrogression" prevented them from drawing a fourth district.

1. Plan C122 & Plan C123

MALDEF proposed Plan C122 and Plan C123 with a new coalition district in Harris County during the session. D-602 at 77; Joint Map Exs. J-3 & J-4. The four-district configuration in Harris County in these two plans is identical. What had been the southeastern part of CD29 (the Latino district) is replaced with the new CD36, a Latino opportunity district (50.1% HCVAP using 2005-2009 ACS data), and CD29 is shifted westward (keeping one of the two main Hispanic population centers from former CD29) and changed into a coalition district (35.7% HCVAP + 21.4% BCVAP). Using 2005-2009 ACS data, CD9 was 40.7% BCVAP (and 17.3% HCVAP) and CD18 was 42.7% BCVAP (and 14% HCVAP). Downton rejected this plan because it did not propose two HCVAP-majority districts (he acknowledged that CD36 is HCVAP-majority but asserted that CD29 was retrogressed because its HCVAP dropped from above 50% to 35.7%). TrA1593. As noted, the Court finds that was a pretextual basis for rejecting the plan, given that it provided more minority opportunity.

However, the Court finds that Plaintiffs have failed to offer sufficient evidence that four compact minority-majority districts could have been drawn in the Houston area. These proposed districts are bizarrely shaped and little information is given concerning how the districts were drawn and what traditional redistricting principles were applied. While CD18 and CD29 remain wholly within Harris County, they are changed significantly from the benchmark configuration. CD9 is also modified and adds a long appendage into Fort Bend County that splits the cities of Richmond, Rosenberg, and Sugar Land. New

CD36 is not particularly compact, its borders do not respect cities, and it contains a small appendage that juts into Brazoria County to pick up 940 individuals, splitting the city of Brookside Village. Plaintiffs fail to offer sufficient evidence that the minority populations in these four districts are compact, taking into account traditional redistricting principles.

2. Plan C163, Plan C164, and Plan C188

Representative Martinez Fischer proposed Plans C163 and C164 during the session, and the four proposed districts in these maps and MALC demonstration Plan C188 (districts 9, 18, 29, and 36) are almost identical. These plans maintain the general shape and location of existing districts CD18 and CD29. Joint Expert Ex. E-18 (Giberson Report) at 7 (noting that the existing Hispanic-majority district CD29 is essentially maintained in its current form, with both large Hispanic population cores remaining in the district). Although these districts are bizarrely shaped, their configuration is arguably explained by the traditional districting principles of maintaining benchmark configurations and member-constituent relationships. New CD36 is placed to the west, and Giberson noted that it encloses some additional areas of Hispanic population in the western part of Harris County. *Id.* Although Giberson gives compactness scores for CD36 in the plans (10.5/2.1/3.8 for C163 and 10.4/2.1/3.8 for C164), he did not comment on the compactness of the districts other than his general observation that none of the districts he evaluated "are compelling by shape alone." *Id.* at 7-8.

Dr. Arrington found generally that Plan C163 "satisfied traditional redistricting principles" without

specifically analyzing the proposed Harris County districts. TrA410-11. He stated generally that Plan C163 overall "did at least as good a job as the 2011 plan in satisfying traditional districting principles." TrA411. The borders of CD36 appear to respect the boundaries of small cities (by excising them from the district), but the boundaries of CD9 cut Stafford, Missouri City, and Arcola. Further, CD36 is not particularly visually compact and extends a fishtail-shaped protrusion into CD9. While this configuration of districts is an improvement over many other plans, the Court nevertheless must conclude that Plaintiffs have not provided sufficient evidence to satisfy the first *Gingles* precondition at this time. As previously noted, Plaintiffs must provide the Court with evidence to find that, taking into account traditional districting principles such as respecting communities of interest (aside from race), these districts include compact minority populations. Unless and until such evidence is presented, the Court cannot find that Defendants violated § 2 by failing to draw a fourth minority district in the Houston area.

3. Plan C166

Plan C166 is offered by the Rodriguez Plaintiffs as creating an additional Hispanic opportunity district in Harris County. Joint Map. Ex. J-7. CD9 is 40.5% BCVAP and 18.5% HCVAP; CD18 is 44.3% BCVAP and 14.8% HCVAP; CD29 is 38% HCVAP and 21.2% BCVAP, and new CD36 is 45.1% HCVAP and 14.2% BCVAP.[136] This

[136] Ansolabahere testified that CD36 was 45.1% HCVAP using 2005-2009 ACS but that he believed it would be slightly over 50% using updated data. Tr1159. In fact, it is 49.1 (+/- .9)% using 2008-

plan was offered by Representative Dawnna Dukes during the session, but she was not pleased with its Harris County configuration, which was a result of having to create the map in a short time. TrA916 (Dukes).[137]

Dr. Arrington testified that he studied Plan C166 and believed it was possible to create a new minority opportunity district in the Houston area. TrA406-07. Arrington found generally that Plan C166 "satisfied traditional redistricting principles" without specifically analyzing the proposed Harris County districts. TrA410-11. Dr. Ansolabahere testified that Plan C166 created an additional Hispanic opportunity district by moving existing CD29 and adding new CD36 in southeastern Harris County. Tr1157-61. The concept of this map is similar to MALDEF's Plan C122.

2012 ACS data. D-565.5. In any event, its combined B+HCVAP would be well over 50%.

[137] The Harris County districts are almost identical to those proposed during the session by Sen. Gallegos in four-district Plan C127. The NAACP and African-American Congresspersons objected to Plan C166 because, they contend, it "seriously undermines the continuing effectiveness of the Harris County African-American opportunity districts" Docket no. 466 at 5. Gallegos noted that 100% of the growth in Harris County was due to minorities, yet no new minority district was created. D-602 at 175. He stated that his proposed map did not retrogress and that there are a number of ways to draw four effective minority districts in Houston "if there is a will." *Id.* He also proposed Plan C129, but no party seems to be offering that plan (and in any event CD1 is far from compact). Gallegos stated that his proposals included two compact Latino districts with HVAP over 60%, one representing "East Side" communities of interest and one representing "North Side" communities of interest. *Id.* at 176-78. He stated that both districts would provide Latino ability to elect even though their SSVR was below 50%. *Id.*

This plan does not demonstrate that four minority coalition districts were required by § 2 because Plaintiffs again failed to proffer sufficient evidence that the minority communities contained therein are compact. Even if new CD36 could be viewed as reasonably compact based on shape, the other three districts are bizarrely shaped. CD9 contains a long tentacle that reaches far into Fort Bend County and splits small towns. Plaintiffs fail to demonstrate that these districts are compact, taking into account traditional redistricting principles.

4. Plan C168

Plan C168 was offered during the session by Rep. Alvarado (Hispanic, Democrat) to add a second Latino opportunity district in Harris County while maintaining the three existing districts. Rep. Alvarado said both districts CD29 and CD36 are completely in Harris County and have a HVAP over 50%, and though the SSVR was slightly under 50%, "both have proven to elect Latino voters' preferred candidate." D-23 at S7.[138] She stated that CD29 remained anchored in north Houston and "picks up the growing Latino communities of west and southwest Houston, Harris County." *Id.*

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[138] Solomons opposed the amendment, stating that the map retrogressed CD29 because it dropped the SSVR to 35.5% and its HCVAP to only 38.6%, and the new district was only 42.5% SSVR and 41.1% HCVAP, and that it in effect had one less Latino opportunity district. D-23 at S9-S10. Alvarado responded that they were coalition districts, and Rep. Veasey stated that Solomons was using arbitrary numbers that "are not the gold standard," and that there are other factors that need to be taken into consideration, including that the proposed district would elect the candidate of choice. D-23 at S10.

The four proposed minority districts in this plan are similar to the ones in Plan C122 and C166. And again, other than the fact that they might reach the numerosity threshold by picking up minority areas and will perform for minorities, Plaintiffs failed to offer sufficient evidence that the minority populations are compact for § 2 purposes.

5. Plan C187

MALC contended that this plan created an additional minority opportunity district in Houston. Joint Map Ex. J-9. However, proposed new minority-coalition CD36 is an absurdly long, visually non-compact district, and Plaintiffs failed to proffer sufficient evidence showing that four compact minority-majority districts were required by § 2.

6. Plan C190

The Task Force alleges that there should be a Latino opportunity district and a coalition district in the Houston area, in addition to the existing two African-American districts, as shown in its demonstration plan C190. Docket no. 416 at 4-7; Joint Map Ex. J-11; PL-345 (map). This map suggests a similar configuration to Plan C122, with proposed new CD36 being HCVAP-majority (50.1% HCVAP using 2005-2009 ACS data) and CD29 taking the northern Hispanic population center from former CD29 and moving westward to become a coalition district (35.7% HCVAP, 57.1% H+BCVAP).[139] The African-American

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[139] As with other plans, Defendants contend that the new Latino district retrogresses CD29 by bringing it from 56% HCVAP and 52.6% SSVR to 35.7% HCVAP and 31% SSVR. Docket no. 411 at 17. The Task Force correctly responds that, by reconfiguring the

districts are 40.7% BCVAP (CD9) and 42.2% BCVAP (CD18). The district locations are also similar to those proposed in Plan C166.

The Task Force says CD29 would be a Latino and African-American coalition district with HCVAP of 35.7%, and that the district provides reasonable opportunity for Latino voters. Docket no. 482 at 73-74 (proposed FF 408-412); docket no. 1274 at 160 (proposed FF 1061). It is wholly contained within Harris County. The Task Force says the district "unites communities with low educational attainment" and "low-income communities" in Harris County. Docket no. 482 at 74-75 (proposed FF 413, 416); docket no. 1274 at 161 (proposed FF 1062, 1065). Further, citing the declaration of Mary Ramos from Houston, the Task Force asserts that CD29 "would combine a largely African American community with a predominantly Latino community into one district" and that the communities joined in CD29 "are largely working class and low income," "share many similarities in terms of the public safety, economic, and educational issues that they face," and "are unified in terms of many of the key issues that voters often look at when choosing who to vote for as an elected official." Docket no. 1274 at 164 (proposed FF 1088); PL-417.

Task Force exhibit PL-364 shows that CD29 joins areas with significant amounts of population 18 years or older who speak Spanish or speak English "not well" or "not at all." The same is true for CD36, though it also

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existing districts to create one Latino opportunity district (the same number as in the benchmark) as well as an additional coalition district, Plaintiffs increase electoral opportunity and do not diminish it. Docket no. 460 at 15.

includes a large area to the east that includes less than 10% such population. Both districts encompass significant amounts of populations with high percentages of adults age 25 and over without a high school diploma. PL-365. Both districts include a mix of median household incomes, though both include predominantly lower income households. PL-366.

Defendant's expert Todd Giberson noted that historically, CD29 has connected two distinct but proximate centers of Hispanic population, one north of downtown Houston and another to the southeast. Joint Expert Ex. E-18 at 6. He states that in Plan C190 these two centers of Hispanic population are severed to form the core of two separate districts. *Id.* Although he provides compactness scores for CD29 (16.0/2.1/4.0) and CD36 (11.5/1.7/2.6), he makes no comments about compactness. *Id.* At his deposition, Giberson stated that CD36 was "probably not an issue" in terms of compactness, and that his concern was about the splitting of CD29. Giberson depo. (Joint Ex. J-42) at 16. However, he acknowledged that the shape of CD29 could be explained by its working around adjacent African-American opportunity district CD18. *Id.* at 16, 21.

The Task Force also states, "In light of the fact that traditional redistricting criteria support the location of new congressional districts in areas of greatest growth, and racial minorities comprised more than 100% of the increase in Harris County from 2000, it is easily understandable why a new congressional district in this area would be majority-minority, regardless of whether § 2 requires such a district. The State presents no evidence to suggest that a new majority-minority district in Harris County would be an unconstitutional racial gerrymander,

as opposed to the natural result of locating a new congressional district in an area of high population growth." Docket no. 460 at 16. Once again, Plaintiffs appear to shift the burden to Defendants to prove that their proposed districts would violate *Shaw*, when the proper burden is for Plaintiffs to demonstrate that four compact majority-minority CVAP districts could be drawn in the Houston area. While it is true that growth in the Houston area was attributable to minorities and Defendants may have been able to draw an additional non-racially-gerrymandered district there that could have performed for minorities, Plaintiffs fail to demonstrate that their plan includes four compact districts required by § 2. Plaintiffs proffer evidence that the districts meet minority population CVAP thresholds and would perform, and that the populations do have some commonalities other than race, but as with CD6 in Plan C190, they fail to proffer evidence showing that, taking into account traditional districting principles, these four districts represent compact minority populations of sufficient number.

7. Plan C193 & Plan C194

The NAACP and African-American Congresspersons offer plan C193, which contains only the two African-American districts CD9 and CD18, and Plan C194, which adds CD29 and CD36. Their expert Murray opined that a new effective Latino district could be added in Harris County without changing the African-American districts (in fact restoring them from changes made in Plan C185), as shown in Plan C193. Tr1047-49, TrA1431-32; TrA1494; Joint Expert Ex. E-4 at 37; Murray depo. (Joint Ex. J-49) at 98-99.

Fairfax testified that Plan C193 met traditional redistricting criteria and could be adopted by the state. Tr834. He stated that CD9 and CD18 were centered in Harris County. Tr836. They retain their benchmark configuration in general. Fairfax stated that CD9 was a majority-minority district with 49.4% BCVAP and 18% HCVAP, and that it complied with the traditional redistricting criteria he analyzed (equal population, contiguity, compactness, and county splits). Tr836. He testified that CD18 was 49.3% BCVAP and 18.6% HCVAP. Tr837. However, these Plaintiffs fail to proffer sufficient evidence showing that districts 29 or 36 contain compact minority populations—CD36 stretches all the way to the coast, and CD29 expands into Montgomery County. Accordingly, they have failed to demonstrate that four compact minority-majority districts were required.

8. Plan C199

LULAC offers its demonstration Plan C199 (LULAC 12-1-C), a four district plan.[140] Tr742 (Korbel). Korbel stated that the purpose of this plan was to see if a Hispanic opportunity district could be added without affecting the numbers of the current Latino opportunity district CD29. He stated that the proposed new district puts the minority population in Jefferson and Galveston Counties in with the primarily Hispanic minority population in Harris County. He acknowledged that "may seem like a stretch" but that it had been traditionally done in Texas, with those areas instead attached to Anglo-dominated districts. Tr694-95 (Korbel). Korbel stated that Plan C185 ties the

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[140] The districts are similar to those proposed in LULAC demonstration Plan C197 for Harris County.

minority community in Jefferson County to the minority community in Galveston County and connects them with a sand dune and then joins them to quite a number of Anglos to make an odd-shaped district (CD14) when one could join the minority community of Jefferson County with the minority community in Harris County to create a new minority district. Korbel depo. (Joint Ex. J-46) at 77-78. However, as discussed previously, the fact that populations or areas may have been joined in other districts for unknown reasons or as part of political gerrymandering does not satisfy Plaintiffs' burden of demonstrating that the minority population contained in their proposed district is compact. Further, these districts are not at ideal population. This map fails to show that four compact districts were required by § 2.

9. Summary of § 2 results claims

In sum, Plaintiffs have failed to proffer a demonstration plan accompanied by sufficient evidence to demonstrate that four minority opportunity districts were required by § 2.[141] However, they are not precluded from raising § 2 results claims with regard to Plan C235 during the trial on that plan.

B. Intentional Vote Dilution

Expert witness Murray noted that Harris and Fort Bend Counties added about 920,000 people between 2000 and 2010, and all the growth was minorities, as the two-county Anglo population declined by about 42,000. Joint Expert Ex. E-4 at 27. As noted, he opined that this minority growth and its location (generally southwestern

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[141] Any other plan not specifically discussed herein suffers from the same lack of proof.

Harris County and the eastern half of Fort Bend County) should make it easy to provide additional minority opportunity in Houston. *Id.*

The Task Force Plaintiffs note that, in 2010, persons of Hispanic origin were 40.8% of the population of Harris County. PL-301 (docket no. 322-5) at ECF 1008. Nearly 80% of the intercensal growth was attributable to persons of Hispanic origin. Joint Expert Ex. E-9 at 5. Non-Hispanic Whites were 33% of the population, and African-Americans were 18.9% of the population of Harris County. PL-301 (docket no. 322-5) at ECF 1008. Despite the fact that minorities were responsible for the growth in the area, and a new district (CD36) was placed partly in Harris County, no new minority district was drawn in the Houston area.

Plaintiffs allege that mapdrawers utilized racial gerrymandering (cracking) to avoid creating a new minority district and to intentionally dilute minority voting strength in the Houston area. *See* docket 1282 (Task Force post-trial brief) at 68 ("In Harris County, where Latinos constituted 79.75% of the growth and the total Latino population exceeds 1.5 million, Texas redistricters created boundaries that prevented the emergence of a new combined opportunity district."); docket no. 1278 at 51 (United States proposed FF 242) ("The 2011 Plan intentionally cracked the Hispanic population of Harris County, dividing 672,362 Hispanics among six Anglo-controlled districts—CD 2, CD 7, CD 8, CD 10, CD 22, and CD 36.").[142] They allege that the

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[142] It is not clear whether any Plaintiffs assert packing claims against districts in Houston. In 2011, Quesada Plaintiffs alleged that CD18 was packed. Docket no. 409 (Quesada Post-Trial Brief) at 46.

configuration of districts and the failure to create a new minority opportunity district despite the minority population growth is circumstantial evidence of dilutive intent. Docket no. 1282 at 78; docket no. 1278 at 52 (proposed FF 244).

The United States relies on Dr. Arrington's expert opinion that mapdrawers used cracking to prevent the creation of an additional Hispanic district. TrA412; US-352 at 48; US-356 at 11; Rod-906.[143] He notes that there are 672,362 Hispanics divided in six Anglo majority districts, four of which "swoop in" from outside Harris county to grab Hispanic population. TrA412-13 ("There

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Kousser testified in 2011 regarding his report (Table 24), which asserted that minority districts were packed, and he stated that BHVAP was increased in all ten districts with BHVAP majorities except CD18. Joint Expert Ex. E-2 at 114-116; Tr296-98. Although the Task Force cites Kousser's Report for his opinion that there was packing and cracking statewide (docket no. 1274 at 414, ¶ 541), no party asserts packing as to a particular district in Houston in their post-2014 trial briefs. The Court notes that the BHVAP numbers for Plan C100 in Kousser's report appear to be incorrect, and when correct numbers are used the BHVAP in CD9 decreased from 74.3% to 72.4 and the BHVAP in CD18 decreased from 76.2% to 71.7%, while the BHVAP in CD29 increased only 1% from 82.5% to 83.5%. Further, CD9 actually contains fewer Hispanics (C100 had 310,931 and C185 has 271,030) and African Americans (C100 had 269,443 and C185 has 267,466) and more Anglos (C100 had 76,112 and C185 has 77,211). This is inconsistent with an intent to pack the district. CD18 has fewer Hispanics, more African Americans, and more Anglos. Only CD29 has more Hispanics and African-Americans and fewer Anglos. To the extent any Plaintiffs are asserting packing claims regarding the Houston minority districts, they have failed to support them.

[143] To the extent Defendants have objected to Dr. Arrington's reports on hearsay grounds, the Court notes that it cites these reports only as support for Dr. Arrington's live testimony at trial.

are a number of Anglo-dominated suburban districts which have fingers reaching into Harris County and picking off Hispanic population and, therefore, cracking that population, making it impossible to create an additional district in Harris County."); US-356 at 11. Given that Hispanic majority district CD29 had 525,996 Hispanics in Plan C185, Arrington reasons that 672,362 Hispanics is more than enough to create a second Hispanic district. US-352 at 49. Arrington also notes the bizarre shapes of the districts as evidence of gerrymandering.[144] *Id.*

The NAACP argues that the fracturing of historic and politically active African-American communities was rampant in Harris County, with communities like the Third Ward/MacGregor neighborhood being fractured. Docket no. 1280 at 22; TrA1451-52 (Murray) (Third Ward/MacGregor had been in CD18 and was now split between CD9 and CD18)); Tr1407-09 (Dixon). The NAACP contends, "Across the board, this fracturing was so precise, and so destructive that it can be explained only by an intent to undermine the emerging political power of minority voters." Docket no. 1280 at 22.

The Court finds that some of the evidence that supported a finding of intentional vote dilution in the DFW area applies to the Houston area. Despite the fact that minorities were responsible for the growth, mapdrawers were hostile to the creation of any district in the Houston area that would contain sufficient minority population to allow them to elect candidates of their choice

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[144] As before, the Court notes that while bizarre shapes are often evidence of gerrymandering, it may be partisan gerrymandering and not necessarily racial gerrymandering.

(because mapdrawers assumed those candidates would be Democrats). Mapdrawers decided that the new map would add only one Democrat seat and three Republican seats, which meant that they would permit only one new minority district. And mapdrawers wanted to limit minority population in the districts at the time of redistricting and for the foreseeable future to minimize their future ability to elect candidates of their choice, which Defendants thought would be Democrats.

Further, the *Arlington Heights* factors, discussed previously, are relevant circumstantial evidence of dilutive intent. Concerning the impact of the plan in Houston specifically, Dr. Ansolabahere noted that Harris County is an example of where Hispanics are disproportionately stranded in Anglo-majority districts. In Plan C185, ten districts take part of Harris County, and seven of those districts draw a majority or plurality of their population from Harris County. Ansolabahere Report (Joint Expert Ex. E-15) at 20. Ansolabahere noted that Harris County is plurality Hispanic (41%) (and there enough Hispanics in Harris County (1.7 million) to populate two and half districts), but only one district based in Harris County is majority-Hispanic (CD29) and none is plurality-Hispanic (two are Black plurality even though Blacks are 19% of the population). Even though Anglos are only 33% of Harris County's population, four of the seven districts (57%) are White-majority. *Id.* at 21, Table 7; Ansolabahere depo. (Joint Ex. J-44) at 83-84. Thus, while Hispanics have the largest population in Harris County, they are distributed in such a way that they have the least representation of all the groups (31% of Hispanics are in plurality or majority-Hispanic districts, while 67% of the Black population is in the two

Black districts, and over 80% of Whites are in majority-White districts). Ansolabahere Report at 21-22.[145] The district lines magnify Anglo representation and shrink Hispanic representation. *Id.*

The Court further notes that the existence of racially polarized voting in the Houston area[146] the lack of minority candidates of choice being elected outside of protected VRA districts, the lingering effects of discrimination that affect voting, and whether the policy underlying the state's action is tenuous[147] are also relevant evidence of intentional vote dilution.

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[145] In Harris County, African Americans have two districts, which is proportionally more than their share of the population (though one district would be less than their proportional share). Ansolabahere depo. (Joint Ex. J-44) at 122-24. But statewide they have less.

[146] The Court again notes that Defendants conceded the existence of racially polarized voting statewide except for Nueces and Kleberg Counties. In addition, there was ample expert and lay witness testimony concerning the existence of racially polarized voting in the Houston area, including but not limited to: Joint Expert Ex. E-15 (Ansolabahere Report) at 33, Table 5; Tr887 (Murray); Joint Expert Ex. E-2 (Murray report) at 26; Tr1333-51 (Al Green); Tr1080-81 (Lawson); Tr1390-91 (Jefferson); Tr1400 (Gonzalez); Tr1412-14 (Dixon); Tr1521-23 (Jackson Lee).

[147] As noted, Republican leadership continually took the position that in proposed plans creating an additional minority district, CD29 would be "retrogressed" and this would violate the VRA to justify their refusal to consider those plans, when the creation of more minority opportunity districts would not be retrogressive and they could not reasonably believe that they would be denied preclearance or sued under the VRA for creating more minority opportunity. This pretextual assertion furthered Defendants' goal of appearing to diligently comply with the VRA while deliberately minimizing its effectiveness and deliberately limiting minority opportunity.

Nevertheless, the Court must find that Plaintiffs have failed to sufficiently distinguish the role of race and politics in the drawing of district lines in Harris County. There is no dispute that minority communities are cracked; the question is whether such cracking was intentionally race-based and racially discriminatory (as opposed to being the result of partisan gerrymandering), and Plaintiffs have failed to offer sufficient proof that it was. Unlike in DFW, Plaintiffs fail to show race-based packing in minority districts or the intentional splitting of a minority district, and Plaintiffs did not provide evidence of precinct splits that were likely race-based as they did in DFW. Further, although minority neighborhoods like Third Ward/MacGregor were split, the Court does not find sufficient evidence that these splits were intended to dilute minority voters or to harm them—minority communities were simply foreseeable casualties of Downton and other decisionmakers pursuing their partisan ends without consideration for or input from the affected minority communities. And existing Supreme Court precedent on partisan gerrymandering precludes any relief for the harmful effects on minority voters in this case. Accordingly, the Court finds that Plaintiffs have failed to prove entitlement to relief under § 2 or the Fourteenth Amendment for intentional vote dilution in the Houston area.

IV. African-American Congresspersons' claims

Congresspersons Eddie Bernice Johnson, Sheila Jackson Lee, and Al Green allege Equal Protection Clause claims based on the claim that the African-American districts were drawn in a way the undermines the ability of African-Americans to effectively participate

in the political process in those areas. Specifically, they complain that mapdrawers unnecessarily split communities of interest, removed important areas from existing districts, and undermined the effective and long-term voter coalition (by creating tension between African-American and Latino voters) in these areas. However, the Court finds that Plaintiffs failed to establish an intent to discriminate based on race in the drawing of the African-American Congresspersons' districts. Rather, the changes to the district were the effects of partisan gerrymandering and the lack of input from Democrat members.

The evidence indicates that Congresswoman Johnson's home was mistakenly drawn out of her district, and mapdrawers were not aware of the error until after the plan was enacted. To the extent specific "economic engines" or district offices were removed, Plaintiffs failed to prove that these areas were knowingly or intentionally removed from the specific districts with an intent to harm or discriminate, and the evidence shows that Anglo members also lost economic engines and district offices. With regard to the potential for tension among racial groups within the districts, the Court finds that Plaintiffs failed to prove that this tension was purposefully created or intentionally discriminatory. Rather, the evidence shows that mapdrawers were concerned with racial population percentages and district performance of these districts for § 5 retrogression purposes, but gave little to no thought about how the different minority populations might interact within the district longterm.

SUMMARY

Plaintiffs have established a § 2 violation, both in terms of intent and effect, in South/West Texas. Plaintiffs have shown that seven compact majority-HCVAP districts could and should be drawn there that would substantially address the § 2 rights of Hispanic voters in South/West Texas, including Nueces County. Defendants' decision to place Nueces County Hispanic voters in an Anglo district had the effect and was intended to dilute their opportunity to elect their candidate of choice. Meanwhile, race predominated in the drawing of CD35, and Defendants' decision to place majority-HCVAP CD35 in Travis County was not to comply with the VRA but to minimize the number of Democrat districts in the plan overall. Plaintiffs have established a *Shaw*-type equal protection violation with regard to CD35. Plaintiffs also establish a *Shaw*-type equal protection violation with regard to CD23. In addition, Defendants' manipulation of Latino voter turnout and cohesion in CD23 denied Latino voters equal opportunity and had the intent and effect of diluting Latino voter opportunity. Nueces County Hispanics and Hispanic voters in CD23 have proved their § 2 results and intentional vote dilution claims. The configurations of CD23, CD27, and CD35 in Plan C185 are therefore invalid.

Plaintiffs fail to proffer a demonstration plan accompanied by sufficient evidence to demonstrate that additional compact minority districts could be drawn in DFW or Houston, taking into account traditional redistricting principles and communities of interest. However, they are not precluded from raising § 2 results

claims with regard to Plan C235 during the trial on that plan.

Plaintiffs have proved intentional vote dilution through packing and cracking in DFW and also establish a *Shaw*-type racial gerrymandering claim with regard to CD26, but not CD6. However, they fail to prove intentional vote dilution in the Houston area, and fail to prove that mapdrawers acted with racially discriminatory purpose when drawing the districts represented by the African-American Congresspersons.

SIGNED on this 2nd day of May, 2017.

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

/s/
ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE

JERRY E. SMITH, Circuit Judge, dissenting:

I respectfully dissent.

First, we no longer have Article III jurisdiction, because, under recent, binding Fifth Circuit caselaw, the case is moot, so we have a constitutional duty to dismiss. Second, although this court should not be issuing an advisory opinion on a matter that is moot, I dissent on the merits, assuming arguendo that the matter is not moot, insofar as the majority finds violations, with the exception of the majority's treatment of DFW, as to which I agree with the result and largely with the reasoning. The

majority's findings of violations in other districts are insufficiently supported in the record under applicable law.

The majority's massive product, including its opinion and its findings and conclusions, is commendable, to say the least. I trust that the attorneys and litigants appreciate the efforts of my two colleagues and their staffs. Though I disagree with a good number of their ultimate conclusions, no one can reasonably question the integrity and dedication that underlie each statement and every decision. The majority's detailed recitation of the record is remarkable in its detail. It is evenhanded, thorough, and fair. It will permit the Supreme Court, on direct appeal, the opportunity to know every nuance of the case in the unlikely event that that Court concludes that the matter is not moot.

There is good news and bad news from the fact that the majority has tackled this colossal task with such proficiency. The good news is that, as I have already said, the reviewing court—as well as the public and, perhaps ultimately the legislature—has the advantage of a full record and a complete explication of the majority's conclusions. The bad news is that that project has taken about 2½ years to complete, measured from the end of trial in August 2014.

No one can reasonably criticize the delay. Some of the parties have made repeated but polite inquiries and have filed motions reminding the court of the need for expeditious resolution in light of the statutory schedule for the 2018 elections. I can appreciate the litigants' and attorneys' frustration that these proceedings have pended for almost six years. But assuming that this panel needed to wade through the huge record and caselaw to announce

a result (beyond a declaration of mootness), the time it spent was absolutely necessary. We explained that in a carefully detailed order entered January 5, 2017, denying the January 2 "Amended Non U.S. Plaintiffs' Joint Motion for Entry of Judgment":

This case involves a voluminous record. As movants acknowledge within this motion, "The litigants in this cause have had two trials totaling hundreds of hours of testimony and thousands of pages of exhibits and evidence. All pending issues have been briefed extensively." In terms of the record alone, this case includes: over 1300 docket entries, including pleadings, lengthy post-trial briefs, reply briefs, supplemental briefs, proposed fact findings, proposed conclusions of law, argument summaries, and Powerpoint presentations from each of the parties in this case (the post-trial briefs and proposed fact findings and conclusions of law from just two of the many parties—Plaintiff Latino Redistricting Task Force and Intervenor United States—total over 1,000 pages); over 10,000 pages of transcripts (including 6,850 pages of transcripts from the trials in this case, not including the interim plan proceedings or any other hearings, thirteen agreed lay witness depositions entered into evidence totaling almost 1,800 pages, and twelve agreed expert witness depositions entered into evidence totaling almost 1,400 pages); approximately 3,000 exhibits, many of which are hundreds of pages long and include numerous lengthy reports, supplemental reports, and rebuttal reports from the twenty-one expert witnesses in this case; as well as numerous disputed proposed deposition excerpts and offers of proof. The relevant case law contains too many pages to count. The Court continues to diligently work through this

voluminous record and the complex legal questions presented in this case and will issue an opinion as soon as possible.

Back to the bad news: Although the delay in respect to an examination of the complex merits issues is understandable, the delay in rendering a dispositive, final, and appealable judgment is not. Once *Davis v. Abbott*, 781 F.3d 207 (5th Cir. 2015), was announced two years ago, reversing the decision of this panel, and more certainly after the Supreme Court denied certiorari in November 2015, mootness was obvious. And no one disputes that a federal district court has the constitutional duty to examine possible want of jurisdiction, including mootness, *sua sponte* if necessary.[1]

But no *sua sponte* examination was even needed: In early May 2015, the state alerted this court to *Davis* with unmistakable precision:

> [In *Davis* the Fifth Circuit] made clear that "after Texas repealed the 2011 plan, . . . the case became moot and eliminated the district's jurisdiction over the remaining issues in the lawsuit." [*Davis*, 781 F.3d] at 220. In light of this new, binding authority on mootness from the Fifth Circuit, the State Defendants respectfully submit that the Plaintiffs' claims in this case were also mooted by the repeal of the challenged 2011 redistricting plans.

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[1] The majority's assertion that "it was Defendants' burden to prove mootness" is misleading. Every federal court has the undeniable duty to assure itself, on a continuing basis, that it has jurisdiction. So any preliminary pronouncements that this panel may have made concerning mootness must be corrected if we no longer have jurisdiction.

> (Because the United States did not file its complaint until after the challenged plans were repealed, it did not present a live case or controversy to begin with.) It follows from *Davis v. Abbott* that the plaintiffs' claims became moot before final judgment; they should therefore be dismissed for lack of subject-matter jurisdiction. At the very least, *Davis* implies that the Plaintiffs' claims are moot if they challenge districts that were, like Senate District 10, modified by the Court and later adopted in modified form by the Legislature.

(Ellipses in original, citations omitted.) The United States, as intervenor, filed a three-page response in mid-May 2015.[2]

In the interest of expediency, and as directed by the Fifth Circuit in a related case that is in all relevant respects identical, the panel should have agreed to issue a judgment of dismissal for mootness no later than late 2015, after certiorari had been denied. That would have provided ample time for a direct appeal to the Supreme Court, which long ago would have rendered a judgment on mootness.

Although misguided, the majority's decision is somewhat understandable if not downright commendable in showing dedication to the task at hand. A bare dismissal for mootness would have incensed the parties aggrieved by it, and if the dismissal had ultimately stood, all the efforts that culminated in the August 2014 trial on the

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[2] Other plaintiffs separately indicated that they joined in that response.

2011 Congressional plan would have been seen as wasted. The panel would have been maligned for "punting" on a significant segment of the Texas decennial redistricting litigation. Moreover—and speaking charitably—my distinguished colleagues may have been reasonably influenced by the "sunk cost fallacy," defined as "continu[ing] a[n] endeavor as a result of previously invested resources (time, money or effort)."[3]

But we are where we are. I will examine, in detail why this matter is moot. Then, with great respect, I will show why significant parts of the majority's legal analysis are infected with clear error.

I. Mootness deprives this court of jurisdiction

A.

The state correctly contended, long ago, that this matter is moot as mandated by *Davis*, a Fifth Circuit decision by which we are bound. Because we are without jurisdiction in the absence of an Article III case or

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[3] "Sunk cost fallacy," https://www.behavioraleconomics.com/mini-encyclopedia-of-be/sunk-cost-fallacy/. The concept results from "bias resulting from an ongoing commitment . . . . [A] person may have a $20 ticket to a concert and then drive for hours through a blizzard, just because [he or she] feels that [he or she] has to attend due to having made the initial investment. If the costs outweigh the benefits, the extra costs incurred (inconvenience, time or even money) are held in a different mental account than the one associated with the ticket transaction." (Citing H.R. Arkes and C. Blumer, "The Psychology of Sunk Costs," *Organizational Behavior and Human Decision Processes* 35, 124-40 (1985); R.H. Thaler, "Mental Accounting Matters," *J. of Behavioral Decision Making* 12, 183-206 (1999).

controversy, the only thing we are empowered to do is to dismiss with prejudice.[4]

It is worthwhile to review the proceedings. The plans at issue (the "2011 plans") were adopted in 2011—six years ago. This three-judge panel of the district court enjoined the implementation of those plans, also in 2011, also six years ago. We twice drew interim maps to be used for 2012, two election cycles ago. While the case was ongoing, Texas also sought preclearance under Section 5 of the Voting Rights Act ("VRA") for these same plans in the U.S. District Court for the District of Columbia. In August 2012, 4½ years ago, a three-judge panel of that court denied preclearance. *See Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013).

The next events happened quickly and were ably and concisely summarized in *Davis*:

> First, while Texas's appeal of the preclearance denial was still pending in the Supreme Court, the Texas Legislature repealed the 2011 plan and adopted the district court's interim plan (Plan S172) without change. This prompted Plaintiffs to ask the Supreme Court to dismiss as moot Texas's appeal of the D.C. court's preclearance denial on June 24, 2013. The next day, on June 25, 2013, the Supreme Court decided *Shelby County, Alabama v. Holder*, – U.S. – , 133 S. Ct. 2612 (2013), finding

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[4] Lest the reader think that this would terminate the Texas redistricting litigation stemming from the 2010 decennial census, a dismissal for mootness would apply only to the 2011 plans, leaving (as the majority acknowledges) the task of litigating the 2013 plans to a conclusion.

> unconstitutional Section 4(b) of the Voting Rights Act—the section containing the coverage formula that automatically required Texas to seek Section 5 preclearance. Although the Court reaffirmed the validity of Section 2 and "issue[d] no holding on [Section] 5 itself," the Court held that Section 4(b)'s coverage formula could "no longer be used" because it was based on outdated data. *Id.* at 2619, 2630-31. The day after *Shelby County* came down, on June 26, 2013, then-Governor Rick Perry signed the bill repealing the 2011 plan, adopting the new Senate plan (that is, the district court's interim plan), and making the plan immediately effective. Finally, on June 27, 2013, the Supreme Court vacated the D.C. district court's judgment denying preclearance of Texas's 2011 plan and remanded the case for further consideration in light of Shelby County and possible mootness. *See Texas*, 133 S. Ct. 2885.

Davis, 781 F.3d at 211-12.

In June 2013, nearly four years ago, Texas repealed the 2011 plans and adopted the second set of interim maps that we had, by then, drawn. Those are the plans that remain in effect today and were used for the 2014 and 2016 election cycles; we have yet to hold a trial on their merit.

In other words, this case concerns maps originally adopted six years ago, and which have not even threatened to be in effect in the past four years. They were never used in an election. Indeed, three elections cycles—2012, 2014, and 2016—have occurred since the putative adoption of the 2011 plans, and in none were the

2011 plans utilized. In these circumstances, it is no surprise that the specter of mootness loomed large.

Nevertheless, when confronted with mootness, we rejected the state's position that claims involving the 2011 plans should be dismissed. *See Perez v. Texas*, 970 F. Supp. 2d 593, 601-03 (W.D. Tex. 2013). We concluded that this fell into the "voluntary cessation" exception to general mootness law, *id.*, and thus that plaintiffs' claims under the never-used, since-superseded plans should survive.

Circumstances dispositively changed when the Fifth Circuit unanimously reversed this panel's decision. Specifically, in *Davis*, the Fifth Circuit ruled, in essence, that claims involving the 2011 Texas Senate plan were moot. We cannot ignore a decision from this circuit that is so unequivocally directed at the enactments that resulted from the 2011 legislative redistricting. Any controversy regarding those enactments is moot, depriving us of jurisdiction.

B.

A precedential decision by a circuit court binds all district courts in the circuit. That command is absolute. Even if this panel would have applied the law differently if it had seen the issue *de novo*—indeed, even if we had previously decided precisely the same issue in precisely the opposite way—we still must follow the dictates of the circuit once it issues a new decision.[5]

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[5] *See, e.g., United States v. Hernandez*, 580 F.2d 188, 189-91 (5th Cir. 1978); *UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 720 F. Supp. 2d 800, 805 (W.D. Tex. 2010); *Jett Racing & Sales, Inc. v. Transamerica Commercial Fin. Corp.*, 892 F. Supp. 161, 163 (S.D. Tex. 1995).

Every district court has the task to determine under what circumstances it is, or is not, bound by circuit precedent. The key distinction is between holdings and dicta. In this circuit, courts "are bound by not only the result but also those portions of the opinion necessary to the result."[6] "A statement is not dictum if it is necessary to the result or constitutes an explication of the governing rules of law."[7] These rules apply to both circuit panels and district courts within the circuit.[8] By contrast, "[a] statement is dictum if it 'could have been deleted without seriously impairing the analytical foundations of the holding' and 'being peripheral, may not have received the full and careful consideration of the court that uttered it.'"[9] So, the test is straightforward: The result of the case, as well as all the reasoning necessary to it, is holding and cannot be disregarded by this district court or by subsequent circuit court panels.

Now to apply these principles to *Davis*. Recall that *Davis* dealt with a challenge specifically to the 2011 State Senate redistricting plans, *see Davis*, 781 F.3d at 209, while the case before us concerns the State House and Congressional plans. After the legislature's decision to repeal and replace all of the 2011 plans, both the plaintiffs and the defendants in *Davis* agreed that the 2011 claims

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[6] *Gochicoa v. Johnson*, 238 F.3d 278, 286 n.11 (5th Cir. 2000) (internal quotation marks omitted).

[7] *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004).

[8] *See, e.g.*, *Hill v. Hom/Ade Foods, Inc.*, 136 F. Supp. 2d 605, 609 (W.D. La. 2000) (citing cases).

[9] *Int'l Truck*, 372 F.3d at 721 (quoting *Gochicoa*, 238 F.3d at 286 n.11).

had, by then, been rendered moot,[10] *id.* at 212, and this three-judge panel entered an order dismissing them, as explained in *Davis*, *id.* at 212-13. As the majority accurately says, *Davis* was not a dispute about mootness, since both sides were in agreement on that; instead, the question was whether the plaintiffs who were challenging the 2011 Senate plan were prevailing parties within the meaning of 42 U.S.C. § 19731(e), thus entitling them to attorneys' fees. That depended on whether they had received any judicially sanctioned relief on the merits of their claims. *Id.* at 213-14.

The plaintiffs in *Davis* brought Section 2, Section 5, and malapportionment claims. With regard to Section 5 and malapportionment, Texas argued that the plaintiffs could not have been prevailing parties because the decision in *Shelby County* rendered the initial decision to enjoin the 2011 Senate plans unconstitutional. *Id.* at 215. The *Davis* panel, consisting of Chief Judge Carl Stewart and Judges Edith Jones and Steven Higginson, unanimously disagreed. They stated flatly that "Texas had *already mooted the entire lawsuit*" by adopting the 2013 interim plan, and thus that the state had waived its opportunity to raise that claim. *Id.* (emphasis added). "In other words, when Texas raised this argument, the district court no longer had jurisdiction to entertain it." *Id.*[11]

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[10] Subject to certain exceptions not relevant here.

[11] For support, the panel cited *National Rifle Ass'n of America, Inc. v. McCraw*, 719 F.3d 338, 344 (5th Cir. 2013), which specifically noted that "[i]f a claim is moot . . . a court has no constitutional jurisdiction to resolve the issues it presents."

So, *Davis* held that Texas could not raise its argument based on *Shelby County* because it had been waived, and the waiver was conditioned on the declaration that the case had been mooted.[12] This easily satisfies *Gochicoa*'s requirement, 238 F.3d at 286 n.11, that courts be bound "not only [by] the result but also those portions of the opinion necessary to the result." *Sans* the mootness determination, the claims would not have been waived, and *sans* waiver, the *Davis* panel would have had to examine Texas's claims regarding *Shelby County*.

With regard to Section 2, *Davis* held that the mootness of the claims prevented the plaintiffs from becoming prevailing parties. The plaintiffs maintained, to the contrary, that this district court's interim order enjoining the implementation of the 2011 Senate plan sufficed to render them prevailing parties. *Davis*, 781 F.3d at 218. The Davis panel rejected plaintiffs' argument; it noted that Texas did indeed adopt the relief mandated by this district court's orders when the legislature enacted the interim plan but that this was not judicially sanctioned relief. *Id.* at 218-19. To the contrary, the fact that Texas adopted the plans of its own accord mooted the plaintiffs' claims, rendering them unable to secure judicially sanctioned relief. *Id.* Without the mootness, the plaintiffs would have been able to claim that the relief was judicially sanctioned. But because Texas's adoption of the interim plans rendered judicial sanction of them superfluous, the plaintiffs could not prevail.

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[12] *See Davis*, 781 F.3d at 215 (noting that "once a district court no longer has jurisdiction to resolve the plaintiffs' claims on the merits, the defendant cannot continue to collaterally litigate against those claims").

Finally, Texas itself requested vacatur of our three-judge district court's two interim orders. *Id.* at 220. The *Davis* panel rejected that as well, and again based its decision on mootness. Texas "believe[d] that *Shelby County* compelled the district court to vacate both of [those] orders." *Id.* But it did not ask the court for that vacatur; instead, it "repealed the 2011 plan and adopted the district court's interim plan in its place, thus *mooting* Plaintiffs' lawsuit." *Id.* (emphasis added). "[I]t was only later, after Texas repealed the 2011 plan, that the case became moot and eliminated the district court's jurisdiction over the remaining issues in the lawsuit." *Id.* Texas could have sought vacatur at the district court level but did not, instead repealing the 2011 plan and mooting the case. By doing so, it could not seek vacatur on appeal. Again, mootness comprised a "portion[] of the opinion necessary to the result." *Gochicoa*, 238 F.3d at 286 n.11. The majority makes no effort to dispute that, nor can it.

To summarize: In *Davis*, mootness comprised a vital—indeed irreplaceable—portion of the reasoning of the decision on the plaintiffs' Section 2, Section 5, and malapportionment claims and the defendant's request for vacatur. None of those statements regarding mootness "could have been deleted without seriously impairing the analytical foundations of the holding." *Int'l Truck*, 372 F.3d at 721 (internal quotation marks omitted). They are thus part of the holding, not *dicta*, and must be followed in all legally indistinguishable cases. *See Hernandez*, 580 F.2d at 189-90.

And this case is nothing if not legally indistinguishable from *Davis*; the only differences are that *Davis* dealt with the State Senate, while we address the State House and Congress, and that the plaintiffs here have refused—by

their silence—to accede to the commonsense proposition that their claims are moot. Under *Davis*, we are bound to dismiss.

C.

The United States urges, essentially, that *Davis* changes nothing and that the governing Fifth Circuit decisions on mootness, which based lack of mootness on voluntary cessation and the continued availability of other remedies, remain correct. These are wan justifications, and though the panel majority accepts them, its logic is faulty, to say the least.

The obvious flaw with the voluntary-cessation argument is that that theory was equally available in *Davis*, yet the *Davis* panel declared the matter moot. *Davis* involved the same claims and nearly the same parties,[13] was in the same procedural posture, and examined the same potentially mooting measures taken by the state. If the case had not been moot—that is, if the voluntary-cessation exception had applied—the Davis panel's various mootness-related holdings would have been invalid. Put another way, *Davis*'s implicit rejection of voluntary cessation as grounds for rejecting mootness was "necessary to the result." *Int'l Truck*, 372 F.3d at 721.

Certainly the *Davis* panel was on firm ground in concluding that. "[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case," but "[t]he case may nevertheless be moot if the defendant can demonstrate that there is no

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[13] There is significant overlap between the plaintiffs in Davis and the plaintiffs here, and the defendant state officials are the same.

reasonable expectation that the wrong will be repeated."[14] The Fifth Circuit has repeatedly held that "[s]uits regarding the constitutionality of statutes become moot once the statute is repealed."[15] In *Save Our Aquifer v. City of San Antonio*, 108 F. App'x 863 (5th Cir. 2004), the court found that Section 2 and Section 5 claims against a voting ordinance were moot once the ordinance had been repealed.

There is no reason to suspect that the legislature would even entertain the notion of reenacting 2011 plans if we were to find this case moot—nothing beyond raw conjecture, which is not enough.[16] Indeed, Texas has already conducted three elections under the 2013 plans, and it is unrealistic to think that the state would choose to scrap all that and throw its electoral system into uncertainty immediately upon a finding of mootness by

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[14] *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-33 (1953) (internal quotation marks omitted).

[15] *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004).

[16] *See id.* at 849 n.3; *see also, e.g., Cnty. of Morris v. Nationalist Movement*, 273 F.3d 527, 534 n.4 (3d Cir. 2001); *AT&T Commc'ns of Sw., Inc. v. City of Austin*, 235 F.3d 241, 243 (5th Cir. 2000); *Robinson v. Kimbrough*, 520 F.2d 1264, 1265 (5th Cir. 1976) (per curiam); *Parrish v. Board of Com'rs of Ala. State Bar*, 533 F.2d 942, 946 (5th Cir. 1976); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 644-45 (6th Cir. 1997); *Wisc. Right to Life v. Schober*, 366 F.3d 485, 491 (7th Cir. 2004); *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994); *Jones v. Tremmer*, 57 F.3d 921, 923 (10th Cir. 1995); *Troiano v. Supervisor of Elections in Palm Beach Cnty., Fla.*, 382 F.3d 1276, 1283 n.4 (11th Cir. 2004); *Nat'l Black Police Ass'n v. Dist. of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997); 13C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3533.6 ("Repeal—even repeal by implication—likewise moots attacks on a statute." (footnote omitted)).

this court. The mere possibility of such a legislative do-over is emphatically not the "virtual certainty" that circuit courts have demanded.[17] Even if *Davis* had not already removed voluntary cessation from the equation, it would not be a viable theory on which to base the notion that there is still an Article III case or controversy.

The second distinction that the United States proffers between this case and *Davis* (and the prime factor relied on by the majority) is that the plaintiffs in *Davis*, contra the plaintiffs here, never pursued Section 3(c). To begin, Section 3(c) remedies are premised on "violations of the fourteenth or fifteenth amendment." 52 U.S.C: § 10302(c). So, the potential availability of Section 3(c) remedies cannot keep the other remedies here—which are all statutory, not constitutional, claims—on life support. Helpfully, the majority at least admits that "the remedied § 2 results claims are moot."

Even beyond that, the Fifth Circuit in *McCorvey*, 385 F.3d at 849, made absolute that "[s]uits regarding the constitutionality of statutes become moot when the statue is repealed." Any Section 3(c) claims question the constitutionality of the plans, given that they are premised on putative violations of the Fourteenth and Fifteenth Amendments, and by the Fifth Circuit's precedent they are moot based on the statute's repeal.

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[17] *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1165-67 (9th Cir. 2011). The majority's insinuation that "there is no indication that the Legislature would not engage in the same conduct . . . in upcoming redistricting cycles" finds no support in the majority's exhaustive review of the record and, moreover, requires the State to prove a negative. Even more importantly, the majority does not even attempt to show—because it cannot—"virtual certainty."

Once the 2011 plan was repealed, the case was dead. Any assertion now of Section 3(c) relief cannot retroactively resurrect it.

As a final point, permitting the Section 3(c) claims to proceed here would ultimately be fruitless; plaintiffs have no hope of winning. Their principal claim is based on intentional voter dilution, which is a Fourteenth Amendment violation. Under Fifth Circuit precedent, plaintiffs must prove that "the purpose [of the challenged law] and the operative effect of such purpose . . . is to dilute the voting strength of [the protected class]."[18] A vote-dilution claim has two elements: "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."[19]

Plaintiffs cannot show both. No 2011 district that was reconfigured in 2013 ever had, or ever could have, any effect on any voter, so plaintiffs cannot establish intentional vote dilution under the Fourteenth Amendment. The 2011 plans were never used for any election; they never had any effect on anyone beyond precipitating this lawsuit. It is a logical impossibility for a plan that never went into effect for any election, and never will be used for any purpose, to be a "violation," in the words of Section 3(c), or to have had an "actual

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[18] *Voter Info. Project, Inc. v. City of Baton Rouge*, 612 F.2d 208, 212 (5th Cir. 1980).

[19] *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality opinion); *see also, e.g., Lucas v. Townsend*, 967 F.2d 549, 551 (11th Cir. 1992) (per curiam); *Backus v. South Carolina*, 857 F. Supp. 2d 553, 567 (D.S.C.), *aff'd mem.*, 133 S. Ct. 156 (2012); *White v. Alabama*, 867 F. Supp. 1571, 1574 (M.D. Ala. 1994); *NAACP v. Austin*, 857 F. Supp. 560, 572 (E.D. Mich. 1994) (three-judge panel).

discriminatory effect." *Bandemer*, 478 U.S. at 127.[20] The 2011 plans were never implemented and will never be used; in circumstances such as these, no plaintiff can show actual injury.

The majority ignores these facts. Instead, it posits that if we dismiss this suit, the resulting confinement of discussion of intent to the 2013 plans "would significantly impact the intent analysis for Plaintiffs' intentional vote dilution claims given the involvement of a different legislature and Defendants' assertion that they could have not such discriminatory intent by simply adopting the Court's interim plans." The majority opines that "[p]laintiffs should not have to jump through additional hoops to prove that the 2011 mapdrawers' intent carried forward to the 2013 legislature." In other words, even without jurisdiction, this court should charge ahead to "decide" the 2011 claims by issuing what would necessarily be an advisory opinion.

That notion is profoundly flawed. Article III contains no exception (nor has any court ever found one) that allows us to resurrect dead claims in order to make it easier for plaintiffs to pursue live ones. If the Constitution requires plaintiffs to jump through hoops to prove their claims in this important litigation, then they will just have to do that.

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[20] This is not a controversial proposition; there are myriad cases reciting the maxim that a plaintiff cannot show injury for a law that has never been, and can never be, applied to him. *See, e.g., Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1183-84 (10th Cir. 2000) (holding that claims against a repealed law were mooted because future enforcement was impossible and prosecutions for past violations were hypothetical); *Lux v. White*, 99 F. App'x 490, 491-92 (4th Cir. 1994) (per curiam) (same).

But even if (by some theory) making things easier for the plaintiffs were an acceptable reason to evade Article III, the endeavor would, in the end, be pointless. As I have shown, plaintiffs must prove both discriminatory intent and discriminatory effect, *Bandemer*, 478 U.S. at 127, and these plaintiffs can never prove any effect from the 2011 plans. Allowing plaintiffs to proceed further down the garden path of a successful Section 3(c) claim before slamming the door shut on them only confers false hope, requires the State to expend more time and effort for no reason, and delays a final resolution. Giving someone a shovel and telling him to dig a hole to China is just as pointless as telling him to do it with his bare hands.

To sum up: Six years later, we are still enveloped in litigation over plans that have never been used and will never be implemented. That second fact—that these plans will not trouble any voter—has been pellucidly clear for at least four years. In addition, we confront a Fifth Circuit case—undeniably binding on this panel—that concludes, as a necessary part of its reasoning, that a case identical in all relevant respects to this one was moot.

The majority insists we press on with granting relief to plaintiffs who have never been, and cannot be, injured by the 2011 plans. This busy panel majority's dedication to exploring the voluminous legal and factual issues is commendable, but we are prohibited from issuing advisory opinions and from ruling where there is no Article III case or controversy. Instead, we should move on to review the 2013 plans and, as to the 2011 maps, accept the Fifth Circuit's mandate—in a decision that reversed this very panel in this very redistricting controversy—instead of trying to keep the case on life support.

II. Summary of the merits

I have commended the majority for its detailed examination of the merits. For two reasons, I will not try to duplicate that detail. First, it would further delay these proceedings, and on balance, that would be unwise in the interest of justice. Second, even assuming that lengthy dissents are read, there are aspects of the majority opinion that miss the forest for the trees. There are some general themes that decide this case as to the respective geographical areas in dispute. I will explore those in due course.

In summary, the majority holds that the plaintiffs have established a Section 2 violation, in intent and effect, for what we are calling "South/West Texas," primarily dealing with CD23, CD27, and CD35. That is clear error. The majority declares that race predominated in the drawing of CD35 and that there is a *Shaw*-type equal-protection violation regarding CD23 and CD35. That likewise is clearly erroneous. The plaintiffs are entitled to no remedy with respect to those three congressional districts.

The majority holds that the plaintiffs have failed to proffer a sufficient demonstration plan for additional compact minority districts in the Dallas/Fort Worth area ("DFW"). That is true.

The majority declares that the plaintiffs have proven intentional vote dilution through packing and cracking in DFW (including, largely, CD30) and have established a *Shaw*-type racial gerrymandering claim for CD 26 but not CD6. I concur in each of those sound recitations.

The majority rules that there is a failure of proof of intentional vote dilution or a racially discriminatory

purpose for districts in the Houston area in respect to the districts represented by the African-American Congresspersons. That is a correct finding.

III. What this case is really about

This case is really about only whether the congressional lines in the challenged districts were drawn for racial or partisan purposes. That is complicated, and the two considerations often overlap. With the exception of DFW, I agree with the State's assertion that the plaintiffs and the United States have utterly failed "to prove that the 2011 Texas Legislature enacted [the challenged plans] for the purpose of diluting minority voting strength rather than protecting incumbents and preserving Republican political strength won in the 2010 elections."

As mentioned above, I disagree with the panel majority's conclusions that race, instead of partisan advantage, drove the decisions made in CD23, in Nueces County and throughout CD27, and in the Austin/San Antonio IH35 corridor affecting primarily CD25 and CD35. As to all those areas, a careful examination of the record in light of the applicable law reveals that, as the State maintains, the goal was to achieve the maximum number of Republican seats in the 36-member Congressional delegation by allotting three of the new seats to Republicans and one to a Democrat. The heavily Republican legislature (in both houses) was determined to protect the Hispanic Republican incumbent in the most closely contested race (CD23), to redraw a safe Republican district (new CD27) in order to reinforce the surprise win by an Anglo Republican incumbent, and to do whatever it took, within the law, to defeat its perceived

bête noir, the outspoken and successful Anglo Democrat, Lloyd Doggett, including creating a new district predictably able to elect an Hispanic Democrat.

For understandable reasons, the majority relegates to a short footnote the brand new and highly significant decision in *Bethune-Hill v. Virginia State Board of Elections*, No. 15-680, 2017 U.S. LEXIS 1568 (U.S. Mar. 1, 2017). I had hoped that the respective parties would be asked to furnish supplemental briefs on this new case, but that would have delayed this matter to some extent. One might easily dismiss *Bethune-Hill* as case- and fact-specific, especially given that the Court summarized by saying that its "holding . . . is controlled by precedent" and that "[t]he Court reaffirms the basic racial predominance analysis explained in *Miller* and *Shaw II*, and the basic narrow tailoring analysis explained in Alabama."[21] But even if *Bethune-Hill* is read as announcing no new law, it sets forth a necessary overview (which the majority fails to mention) of the current Supreme Court's take on redistricting.

The Court reminds us that race is not invisible and that "the legislature always is aware of race when it draws district lines." *Id.* at *16. The key question (as the majority properly acknowledges) is whether "race was the predominant factor" in placing voters into or out of a district." *Id.* (citing *Johnson*, 515 U.S. at 916). But what does the Court mean by "predominant factor"? The Court explains that the reason for drawing the district must be

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[21] *See Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

"race for its own sake." *Id.* at *18 (quoting *Johnson*, 515 U.S. at 515); *id.* at *20.

Probing further, what does the Court mean by "race for its own sake"? To answer that, the Court returns to *Shaw II*: The test for race as the "predominant factor," and thus for "race for its own sake," is whether "[r]ace was the criterion that, in the State's view, could not be compromised." *Id.* at *19 (quoting *Shaw II*, 517 U.S. at 907). That can only mean that to satisfy the test, a plaintiff must show that the state acted, in regard to a given voter or group of voters, on the ground that the voter's race was significant in and of itself and not for some other, non-invidious reason.

And importantly: In *Bethune-Hill* the Court goes out of its way to emphasize that examination of legislative lines is at the macro, not micro, level. "[T]he basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district." *Id.* at *23. This means that "[a] holistic approach is necessary." *Id.* at *24. A court's ultimate inquiry must be into "the legislature's predominant motive for the design of the district as a whole . . .; any explanation for a particular portion of the lines, moreover, must take account of the districtwide context." *Id.*

Also as relevant to the case at hand, *Bethune-Hill* addresses the dilemma that legislators face when trying to achieve legitimate goals in redistricting while still complying with the VRA and especially now-inapplicable Section 5. The test is not whether using race was eventually shown to be "actually necessary" but, instead, only whether the legislature had "good reasons to believe" that it must use race. *Id.* at *26 (quoting *Alabama*, 135 S. Ct. at 1274). Under the facts of *Bethune-Hill*, the Court

concluded that state officials, "charged with the sensitive duty of reapportioning legislative districts," "had a strong basis in evidence to believe a 55% BVAP floor was required to avoid retrogression" under Section 5. *Id.* at *28.

In addition to *Bethune-Hill*, the other Supreme Court decision that needs more deference than the majority affords it is *Easley v. Cromartie*, 532 U.S. 234 (2001), to which the majority gives scant attention and dismissively declares, in a footnote, to be "distinguishable." In *Cromartie*, the Court reminds us that the "ultimate" decision is whether "the legislature's motive was predominantly racial, not political." *Id.* at 241. "Caution is especially appropriate . . . where the State has articulated a legitimate political explanation . . ., and the voting population is one in which race and political affiliation are highly correlated." *Id.* at 242. "A legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts, but the reasons would be *political rather than racial*." *Id.* at 245 (emphasis added).

Also importantly, the Court in *Cromartie* rejected a contention that using a precinct split and "placing the more heavily African-American segment" into a district was impermissible. *Id.* at 248. The Court found no infirmity in the fact that "the legislature drew boundaries that, in general, placed more-reliably Democratic voters inside the district, while placing less-reliable Democratic voters outside the district." *Id.* at 252. That statement can logically be applied to voters who are more "reliable" because of a higher history of turnout.

In *Cromartie*, the Court reversed, as clearly erroneous, the three-judge district court's finding that racial considerations predominated. As the Supreme Court explained, it reversed "because race in this case correlates closely with political behavior. The basic question is whether the legislature drew [the] boundaries because of race rather than because of political behavior (coupled with traditional, nonracial districting considerations)." *Id.* at 257. Racial considerations were not "dominant and controlling." *Id.*

IV. Applying the law to the facts

Texas redistricting in 2011 was essentially about politics, not race. All sides concede that—whether it is a good thing or not—Texas has a strong correlation between race and party. As the majority states, "93 of the 101 Republican members of the House in 2011 were Anglo, while only 8 of the 49 Democrat members were Anglo." It naturally follows that actions taken to disadvantage Democrats will disproportionately affect non-Anglo voters, regardless of the intent. It falls to the courts to decide whether those decisions were directed at "race for its own sake."

The record amply demonstrates that the Congressional redistricting (as well as that for the State House) was designed for the sole purpose of maximizing the number of Republicans to increase political power. That primarily meant protecting Republican incumbents irrespective of their race or the race of their constituents.

That is true, for example, in the perennially litigated CD23. The State drew CD23 for purely permissible partisan political reasons and to comply with the VRA: to make it a district with a reliable HCVAP majority

(increased from 58.4% to 58.5%, which the State saw as an Hispanic opportunity district) and to give the best chance of reelection to newly elected incumbent, Hispanic Republican Quico Canseco, who had been the surprise winner in 2010.

The majority makes no effort to show—because it cannot, under this record—that "[r]ace was the criterion that . . . could not be compromised" or that the district was a "race-based decision."[22] The testimony of expert Theodore Arrington showed that the precincts moved into CD23 had higher levels of Republican performance than those that were removed.[23] Protection of incumbents is one of the most often recognized traditional redistricting principles. The majority's findings, including that "race was the predominant motive" and that "[t]here was both discriminatory motive and improper use of race," are clearly erroneous.

The same is eminently true of CD27. Blake Farenthold, an Anglo Republican, was another surprise winner in the 2010 Republican sweep. The Republican legislature set out to protect him. In addition, the legislature pursued the racially neutral goal of placing the Port of Corpus Christi in a separate district from the competing Port of Brownsville so that each of those districts would have a major city/port as its anchor. In its

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[22] *Bethune-Hill*, 2017 U.S. LEXIS 1568, at *19.

[23] The winners in CD23 undermine the stereotype that Republicans are Anglo and Democrats are not. As the majority points out, in recent terms the seat has been filled by Conseco (elected in 2010) and by African-American Republican Will Hurd (elected in 2014 and 2016). Curiously, the majority labels Hurd only as "a non-Latino," thus masking the fact that he is in the rare category of African-American Republican.

interim order, this court found no violation as to CD27, and nothing has changed that should alter that sound decision. The majority's change of heart, now finding "intentional vote dilution," is clearly erroneous.

The situation for Travis County, affecting mainly CD25 and CD35, is, to put it mildly, unique. No one will dispute that the Republican majority in the legislature viewed Travis County as the most liberal of the sizeable counties in Texas, also wielding disproportionate influence as the seat of state government and the University of Texas. As the State boldly acknowledges, "The Legislature reconfigured CD 25 to ensure that Democrats in Travis County, including Anglo Democrats, did not maintain their ability to elect a member of Congress."

Purely as a political matter, the Republicans saw opportunity for a "twofer": fragmenting Travis County into relatively harmless parts, rather than a unified political force, and, by the same fragmentation, defeating Congressman Doggett, an Anglo Democrat, by placing his house in heavily Republican CD25.[24] Or maybe even a "threefer": creating a Latino opportunity district in Travis County and the San Antonio/Austin I-35 corridor. It is fanciful to contend that that decision—whether or not wise in terms of public policy or fairness—was one as to which race was "the legislature's predominant motive for

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[24] "He is one of the most liberal white Democrats from a Southern district, and one of the most liberal congressmen ever to represent Texas in Congress. He has been described as a strong voice for his party on taxes and environmental policies and as a 'muscular progressive.'" Wikipedia, Lloyd Doggett, https://en.wikipedia.org/wiki/Lloyd_Doggett (quoting "Sober Look at the Depth Chart Intensifies for House Democrats," *Roll Call* (Feb. 2, 2014).

the design of the district as a whole." *Bethune-Hill*, 2017 U.S. LEXIS 1568, at *24. The question is "whether the legislature drew District [35's] boundaries because of race rather than because of political behavior (coupled with traditional, nonracial districting principles)." *Cromartie*, 532 U.S. at 257.

An attempt to dislodge an incumbent political adversary should logically be viewed as a permissible redistricting principle, as is true for the traditional principle of protecting an incumbent. It only stands to reason that if a partisan political majority can exercise its legislative weight to protect its friends, it can do that to punish its enemies for political, non-racial reasons.[25] The main point still is that by no stretch of the imagination can what happened to Travis County and Congressman Doggett be chalked up to racial motive.[26] In its interim order, this panel found no likelihood of success for the *Shaw*-type claims for CD35. The majority now finds, to the contrary, that "race pre-dominated in the drawing of CD35." Nothing has changed, and the same result should obtain now as then. The majority's revised finding is clearly erroneous.

In stark contrast to Travis County and CD35 is the DFW (Dallas/Fort Worth/Arlington) Metroplex. Relatively little about the 2011 Congressional

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[25] In *LULAC v. Perry*, 548 U.S. 399 (2006), the Court rejected a challenge to the dismantling of CD24 that was effected to defeat incumbent Anglo Democrat Martin Frost.

[26] As it turned out, Doggett, the incumbent in CD25, won re-election running in the newly-created CD35, promising to move if elected. (The Constitution requires a Member of Congress to live in the state but not in his or her district.

redistricting passes the smell test as to DFW, the largest metropolitan area in Texas with 6.4 million residents in 2010 but where the apparent choice of minority voters in 2010 was reflected only in CD30 (veteran African-American Democrat Congresswoman Eddie Bernice Johnson). Naturally, the law requires that we conduct much more than a smell test, and the majority goes well beyond that to show, in detail, vote dilution by "packing and cracking" and a *Shaw*-type violation with regard to CD12 and CD26 and to find no violation for CD6.

In terms of what redistricting law requires, the differences between DFW and Travis County/CD35 are dramatic, and, with all due respect, I hope the majority will revisit the latter. The goal and the methods for Travis County/CD35 were so overwhelmingly and purely partisan and political that, even if the peculiarities of Travis County are viewed as *sui generis*, in no respect can it reasonably be said that the breakup of the county and the creation of CD35 were for "race for its own sake."[27]

Then look at DFW: Minority voters moved into CD30 without substantial explanation. And disparate Latino communities in Fort Worth joined together without demonstrated reason, and unusual appendages added to CD26 from an adjoining, but demographically dissimilar, neighboring county. As the majority properly says, "we have admissions from the mapdrawer that he used race as the sole criteria for assigning a significant portion of voters into and out of CD26, and that his sole basis for regarding them as a community of interest was their race, given that he had no familiarity with the area" (citing *Johnson*, 515 U.S. at 911-12). That looks more like race

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[27] *Bethune-Hill*, 2017 U.S. LEXIS 156, at *18.

for the sake of race. By way of stark contrast, the districts drawn in Travis County and the I-35 corridor do not.

And last, there is the Houston area. I agree with the panel majority that the plaintiffs did not offer sufficient proof of the first *Gingles* factor, so the Section 2 claims premised on coalition districts fail. And the claims of the African-American Congresspersons—two in the Houston area and one in Dallas—are properly seen as unsuccessful.

Regarding Houston-area districts, the plaintiffs desperately tried to find examples of racial slights, but those presentations were especially unimpressive. They quibbled about loss of, or swaps concerning, "economic engines," which are generally recognized as prestigious for any Member of Congress and often provide a good source for fundraising. One expert went so far as to contend that the Astrodome/NRG Stadium complex (home of the Houston Texans NFL team and the Houston Livestock Show and Rodeo and, *inter alia*, the site of the 2017 Super Bowl and the 2016 NCAA Men's Basketball Final Four competition) was not a meaningful economic engine for purposes of redistricting. The plaintiffs complained of Congress Members' loss of district headquarters, though the proof showed that statewide, as well as in the Houston area, many more Republican than Democrat members lost their headquarters. And the plaintiffs bemoaned the swap of some important economic engines between and among the Democrat Congress Members representing the Houston area, though in every case, any loss of significant economic engines was replaced with approximate equal value. One African-American member complained of the incursion of Latinos into his district and was concerned that, in a large

undeveloped tract added to his district, housing might be built that would be populated mainly by higher-income persons (presumably meaning Anglos).

V. The United States as intervenor

I have saved the worst for last, ending unfortunately on a sour note (as many dissents do). I make a needed observation on the behavior of the United States and compare it with the performance of the other plaintiffs and the State. In short, the United States should not have been permitted to intervene in the first place.[28] That was wholly unnecessary, and its presence has negatively infected these proceedings.

The various plaintiffs and plaintiffs' groups were, and are, magnificently represented by talented counsel, most of whom have appeared in Texas redistricting litigation through the decades, usually with notable success. They are candid and fair with the court and opposing counsel. As officers of the court, they strike the proper balance between zealous advocacy and professionalism. They generally refrain from taking completely meritless positions, and their briefs and courtroom presentations reflect an advocate's colorable reading of the law, so they have credibility. They take setbacks and frustrations in stride. Their experts—usually also veterans of Texas redistricting cases past and present—are well versed in the facts of Texas geography and demographics. They meet the court's often rigid scheduling and briefing demands with alacrity and cooperation. In short, they

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[28] I dissented from the majority's decision to grant the motion to intervene. I will not repeat those reasons, which were *ex ante*. The majority judges on this panel bear no responsibility for the behavior of the United States, which I review *ex post*.

represent their clients well but, at the same time, assist the court in deciding the issues. The same has been, and is, true of the State defendants, ably represented by attorneys from the Office of the Attorney General. Though badly outnumbered, they likewise have aided this court with their skillful advocacy and honest but spirited presentations. They have cooperated with opposing counsel by, for example, refraining from weak objections to evidence and testimony and have conceded points, where appropriate, as officers of the court. Though for the most part they are relatively new to Texas redistricting (at least as compared to plaintiffs' counsel), they exude a thorough knowledge of the law and facts. The State is as blessed to be represented by their attorneys as the plaintiffs are by theirs.

And then there is the United States, appearing through attorneys from the Department of Justice. I have no criticism of their knowledge of the law, and their zeal is, to say the least, more than adequate. But they entered these proceedings with arrogance and condescension. One of the Department's lawyers even exhibited her contempt for Texas and its representatives and her disdain for these proceedings by regularly rolling her eyes at State witnesses' answers that she did not like, and she amused herself by chewing gum while court was in session.

It was obvious, from the start, that the DoJ attorneys viewed state officials and the legislative majority and their staffs as a bunch of backwoods hayseed bigots who bemoan the abolition of the poll tax and pine for the days of literacy tests and lynchings. And the DoJ lawyers saw themselves as an expeditionary landing party arriving here, just in time, to rescue the state from oppression, obviously presuming that plaintiffs' counsel were not up

to the task. The Department of Justice moreover views Texas redistricting litigation as the potential grand prize and lusts for the day when it can reimpose preclearance via Section 3(c).

Of course, these are just personal impressions based on demeanor and attitude. More objectively verifiable are the witch hunts and fishing expeditions that the DoJ conducted in pursuit of its goals. I give two examples.

First is the DoJ's vicious attack on Clare Dyer, a dedicated career employee of the Texas Legislative Council who has served both Democratic and Republican legislatures. She was a key witness on several aspects of the redistricting process. The DoJ accused Ms. Dyer and the mapdrawers of intentionally removing the house of Congresswoman Johnson from her district, CD30. That was an attempt to show blatant and intentional racial discrimination by targeting the only minority member of the DFW Congressional delegation and one of only three African-American Texas Congress Members.

It was nothing short of bizarre for the DoJ to think that Ms. Dyer, the redistricting staff, and the Republican legislative leaders would—at one and the same time—both pack African-American voters into Congresswoman Johnson's district and remove her from it. Members of Congress are not required to live in their respective districts, and the line that was accidentally drawn placed Congresswoman Johnson barely outside the district. No one can doubt that, especially given the packing into CD30, she would have easily won reelection anyway. So it defies common sense that legislative leaders and staff would have taken an action that would be seen as openly discriminatory on the basis of race, with no possible political gain.

But the DoJ was desperate to find some evidence of overt racism to lay the foundation for a Section 3(c) remedy. It wasted substantial time at trial looking for the smoking gun by its mean-spirited questioning of Ms. Dyer and other witnesses, certain that they were guilty of rampant bias.

As it turns out, the error was purely accidental and resulted not from any intent or mistake by Ms. Dyer, but only from the fact that Congresswoman Johnson's house had inadvertently been shown using a 2009 census block instead of a 2010 census block. The majority appropriately finds that "[t]here is no evidence that mapdrawers became aware during the redistricting process that they had not included Johnson's home in her district or that anyone asked them to remedy the problem before the map was adopted."

Another example of a Department of Justice witch hunt, in its frustrated attempt to find evidence of intentional discrimination to support an ultimate claim for Section 3(c) opt-in relief,[29] was its unsuccessful fishing expedition to uncover a smoking gun regarding what occurred on Monday and early Tuesday, June 13 and 14, 2011. As the majority opinion aptly shows in detailing the minute-by-minute communications from very early morning to late at night, those were critical days for finalizing maps for the 2011 redistricting.

The DoJ was determined to uncover racially-tinged communications (perhaps shopping for firehoses on the

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[29] I acknowledge that the DoJ is not the only party mentioning Section 3(c) relief and attempting to develop proof to support it. My focus, however, is on the DoJ's obvious main purpose for intervention and its behavior in presenting its theories.

Internet?) to prove that the ultimate maps were based on "race for its own sake." Because it was inadequately prepared, the DoJ called witness after witness, and presented document after document, to try to confect a paper trail from which the court could infer bigotry. The State accurately recounts the record as follows:

> After three years and multiple opportunities for discovery, DOJ can offer nothing more than a string of question-begging assertions to connect Eric Opiela's 'nudge factor' e-mail to the Legislature's redistricting plans. There is still no evidence that Eric Opiela developed the "useful metric" he proposed in November 2010, no evidence that any person used his metric to draw districts in 2011, and no evidence that any person who worked on the 2011 plans considered turnout data or used any other race-based method to achieve partisan goals.

The DoJ wholly failed, but not for lack of trying. There was, and is, no smoking gun in this record, nor has the United States shown that the State hid or failed to disclose one. The DoJ's scheme to build a record on which to urge opt-in relief via Section 3(c) has initially failed. Of course, if this court is deemed to have jurisdiction, the judges will consider any remaining claims pressed by any party, including Section 3(c) claims, as appropriate.

The Department of Justice has overplayed its hand and, in the process, has lost credibility. The wound is self-inflicted. The grand theory on which its intervention was mainly based—that invidious racial motives infect and predominate in the drawing of the 2011 district lines—has crashed and burned.

I respectfully dissent from the refusal to dismiss for want of jurisdiction.

/s/
JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

APPENDIX D

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-CV-360
	§	
RICK PERRY, ET AL.	§	

ORDER

On February 28, 2012, this Court issued PLAN C235 as the interim plan for the districts used to elect members in 2012 from Texas to the United States House of Representatives. This interim map is not a final ruling on the merits of any claims asserted by the Plaintiffs in this case or any of the other cases consolidated with this case. Nor is it intended to be a ruling on the merits of any claim asserted in the case pending in the United States District Court for the District of Columbia. Rather, this interim map is a result of preliminary determinations regarding the merits of the § 2 and constitutional claims presented in this case, and application of the "not insubstantial" standard for the § 5 claims, as required by the Supreme Court's decision in *Perry v. Perez*, 565 U.S. __, 132 S. Ct. 934 (2012) (per curiam).

Both the § 2 and Fourteenth Amendment claims presented in this case involve difficult and unsettled legal issues as well as numerous factual disputes. It is

especially difficult to determine whether a claim has a likelihood of success when the law is unsettled, as many areas of § 2 law are. Further, both the trial of these complex issues and the Court's analysis have been necessarily expedited and curtailed, rendering such a standard even more difficult to apply. The Court has attempted to apply the standards set forth in *Perry v. Perez*, but emphasizes that it has been able to make only preliminary conclusions that may be revised upon full analysis.

The Court heard extensive testimony concerning the need to have the primaries as soon as possible, and the resulting need for the Court to produce an interim map with sufficient time to allow officials to implement the map. Some Plaintiffs and Intervenors presented a compromise plan – C226 – that would allow the primaries to proceed on May 29 and not require split primaries (thus avoiding significant costs to the counties). Defendants indicated that they have no objection to the Court's issuing an order directing that plan C226 be used on an interim basis for the 2012 elections. The Court finds that adoption of the compromise plan, if consistent with the standards set forth in *Perry v. Perez*, would significantly benefit the voters, candidates, election administrators, counties, and political parties. Because the Court's independent analysis of the plan indicates that it complies with the standards set forth in *Perry v. Perez*, the Court accepts the compromise plan, modified for purely technical reasons as discussed in Part III.A, as the interim plan.

I. Factual and Procedural Background

A. Congressional Redistricting in Texas

The decennial census was conducted last year, pursuant to Article I, § 2 of the United States Constitution. The 2010 census data showed that the population of Texas had increased from the 2000 population of 20,851,820 to 25,145,561, an increase of about 20.6%.[1] It is undisputed that minority population growth, especially in the Hispanic community, accounted for much of the population increase.[2] The population changes mean that the current congressional districts are malapportioned and in violation of the one-person, one-vote principle,[3] and the population increase entitles the State of Texas to four additional seats in the United States House of Representatives. Thus, the State of Texas undertook redistricting efforts to reapportion seats. *See* U.S. CONST. ART. I, § 2.

S.B. 4, the proposed congressional plan, was first made public on May 31, 2011. A hearing was held on June 3, 2011. S.B. 4 passed the Texas Senate on June 6, and passed the Texas House on June 15. S.B. 4 was reported to the Senate as amended on June 16, and reported enrolled on June 20. S.B. 4 was sent to Governor Rick

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[1] http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf

[2] A comparison of 2000 and 2010 census data shows that the number of persons of Hispanic or Latino ethnicity increased by 2,791,255, accounting for 65% of the total population growth of 4,293,741.

[3] *See Abrams v. Johnson*, 521 U.S. 74, 98 (1997) (the constitutional guarantee of one person, one vote requires congressional districts to achieve population equality "as nearly as is practicable") (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964)).

Perry on June 24. Governor Perry signed the bill into law on July 18, 2011. The State's enacted plan drew one new minority opportunity district – Congressional District ("CD") 35 – along the I-35 corridor between Travis County and Bexar County, but drew no other additional minority opportunity districts.[4]

B. Proceedings in this Court

Numerous Plaintiffs and Intervenors filed suit in this Court, asserting constitutional and statutory challenges against the State's enacted map. Plaintiffs assert that the State failed to draw additional required minority opportunity districts in the Dallas-Fort Worth metroplex ("DFW"), the Houston area, and West/South Texas, despite the substantial minority population growth there and satisfaction of the requirements for drawing such districts under § 2 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973. Section 2 of the VRA requires the State to draw a minority opportunity district if the Plaintiffs demonstrate that the requirements of *Thornburg v. Gingles*, 478 U.S. 30 (1986), are satisfied. *Gingles* requires Plaintiffs to demonstrate: (1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that the minority group is politically cohesive; (3) that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate; and (4) if the first three requirements are shown, that, considering the totality of

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[4] CD 34 appears to be a "new" minority opportunity district, but it is a replacement for CD 27, which is no longer a minority district.

circumstances, the minority group has less opportunity than whites to participate in the political process and to elect representatives of its choice.

Plaintiffs allege that the State racially gerrymandered districts to avoid drawing new minority opportunity districts and to intentionally disadvantage minority voters. Plaintiffs further complain that the State intentionally weakened CD 23, a minority opportunity district, to protect a Republican incumbent who was not the minority candidate of choice, and that the new configuration of CD 27 and the South Texas area dilutes Hispanic voting strength throughout South, West, and Central Texas in violation of § 2 and the Fourteenth Amendment. In addition, the Rodriguez Plaintiffs complain that the enacted map intentionally dismantled a functioning "tri-ethnic coalition" district (CD 25) in Travis County in violation of the Fourteenth Amendment.

Plaintiffs further challenge and seek to enjoin implementation of the State's enacted plan under § 5 of the VRA because it has not received preclearance. It is undisputed that Texas, as a jurisdiction with a history of racial discrimination in voting, is subject to the preclearance requirements of § 5 of the VRA, as amended and codified at 42 U.S.C. § 1973c.[5] A legislatively enacted

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[5] As the Supreme Court observed in its recent opinion concerning prior redistricting efforts in Texas, "The District Court recognized 'the long history of discrimination against Latinos and Blacks in Texas,' and other courts have elaborated on this history with respect to electoral processes:

> "Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in

plan that has not received preclearance cannot be implemented.

C. D.C. Court Preclearance Proceedings – Summary Judgment

The State chose to obtain the preclearance required by § 5 by filing a lawsuit on July 19, 2011, and that suit is currently pending before a three-judge court in the United States District Court for the District of Columbia (hereinafter "the D.C. Court").[6] In that lawsuit, the State of Texas, as Plaintiff, has asked the D.C. Court to declare that the enacted plan complies with § 5 and that it may be implemented.[7] Section 5 provides that any voting qualification, standard, practice, or procedure (which includes redistricting) "that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or [membership in a language minority group], to elect their preferred candidates of choice denies or abridges the

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> the electoral process. Devices such as the poll tax, an all-white primary system, and restrictive voter registration time periods are an unfortunate part of this State's minority voting rights history. The history of official discrimination in the Texas election process—stretching back to Reconstruction—led to the inclusion of the State as a covered jurisdiction under Section 5 in the 1975 amendments to the Voting Rights Act. Since Texas became a covered jurisdiction, the Department of Justice has frequently interposed objections against the State and its subdivisions.'"

LULAC v. Perry, 548 U.S. 399, 439-40 (2006) (citations omitted).

[6] *State of Texas v. United States of America & Eric Holder*, Civ. A. No. 1:11-CV-1303 (D.D.C.). Filings in the D.C. Court are noted as "D.C. docket no. __."

[7] D.C. docket no. 1 (Original Complaint) at ¶ 48.

right to vote . . . ." *Id.* § 1973c(b). The statute further explains that the term "purpose" shall include "any discriminatory purpose," and that the purpose of subsection (b) "is to protect the ability of such citizens to elect their preferred candidates of choice." *Id.* §§ 1973c(c), (d).

The United States and several Intervenors (collectively "the Defendants" in the D.C. proceedings) filed answers challenging the congressional plan, asserting that it is retrogressive in effect and was enacted with a discriminatory purpose in violation of § 5.

The State moved for summary judgment on its preclearance request on September 14, 2011.[8] After receiving briefing and hearing oral argument, the D.C. Court denied the motion for summary judgment on November 8, 2011.[9] The D.C. Court issued a memorandum opinion on December 22, 2011 explaining its denial of summary judgment.[10] In the memorandum opinion, the D.C. Court did not make rulings with regard to specific aspects of the State's plan. Rather, it discussed the applicable standards under § 5, including that the State has the burden of proof to show that the planned change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or [membership in a language minority group.]" 42 U.S.C. § 1973c(a).

To determine whether a redistricting plan has the effect of diminishing the ability to elect minority-

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[8] D.C. docket no. 41 (Motion for Summary Judgment).

[9] D.C. docket no. 106 (Order on State's Motion for Summary Judgment).

[10] D.C. docket no. 115 (Memorandum Opinion).

preferred candidates (*i.e.*, a retrogressive effect), a court compares the enacted plan with a benchmark plan, which in this case is the redistricting plan currently in effect (plan C100, referred to herein as the "benchmark plan"). The D.C. Court held that the proper comparison is the minority group's *ability to elect* under the benchmark and enacted plans. The D.C. Court rejected Texas's position that the standard for determining retrogressive effect should include an evaluation of voting population demographics alone. Rather, it concluded, the inquiry is a functional one that involves numerous factors. Under this functional analysis, questions remained concerning which districts could be considered ability districts. Because Texas used the wrong standard, the D.C. Court concluded, there were material facts in dispute about which districts are minority ability districts, and the D.C. Court was unable to determine on the summary judgment record whether the enacted plan would have a retrogressive effect.

In addition to the claim of statewide retrogression, the retrogressive effects dispute focused primarily on Districts 23 and 25. The performance of CD 23 in electing minority candidates of choice was diminished in the enacted plan, and the parties disputed its status as an ability district. The Gonzales Intervenors argued that CD 25 was a crossover ability district[11] in the benchmark plan,

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[11] The Supreme Court has defined a "crossover district" as "one in which minority voters make up less than a majority of the voting-age population" but "the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009).

and that it must be factored into the retrogressive effect analysis. The D.C. Court agreed that, as a legal matter, coalition[12] and crossover districts provide minority groups the ability to elect a preferred candidate and must be recognized as ability districts in a § 5 analysis, but that there "must be discrete data, by way of election returns, to confirm the existence of a voting coalition's electoral power."[13]

The D.C. Court further held that, to determine whether a redistricting plan has a discriminatory purpose, courts should utilize the framework in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), which asks whether invidious discriminatory purpose was a motivating factor in the government body's decisionmaking. The D.C. Court concluded that Texas's failure to account for the significant increase of the Hispanic population did not establish a retrogressive effect, but is relevant to the evaluation of whether the congressional plan was enacted with a discriminatory purpose. The Court stated that it is "significant circumstantial evidence that the plan was enacted with the purpose of denying or abridging [the minority] community's right to vote."[14] The D.C. Court did not discuss the discriminatory purpose standard with regard to any particular district or area of the enacted plan, but concluded that Texas failed to demonstrate that the plan

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[12] A coalition district is a district in which two separate minority groups form a coalition to elect the candidate of the coalition's choice. *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009).

[13] D.C. docket no. 115 at 36.

[14] D.C. docket no. 115 at 40.

as a whole did not have the purpose of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

D. This Court's November 26, 2011 map

In light of the fact that the enacted map had not yet gained preclearance and considering well-settled Supreme Court precedent providing that a legislative plan that has not obtained § 5 preclearance cannot be effective as law,[15] this Court sought to defer to the portions of the Legislature's plan that were unchallenged but otherwise to draw a plan that maintained the status quo so as not to interfere with the pending preclearance proceedings or put into effect a plan that might be denied preclearance. Following these guidelines, a majority of this Court issued a map on November 26, 2011. The State appealed, and the Supreme Court granted review. On January 20, 2012, the Supreme Court set forth new standards for the Court to follow given the procedural posture of the case.

E. *Perry v. Perez*

In *Perry v. Perez*, the Supreme Court stated for the first time what standards should apply when a preclearance decision is pending at the time an interim map must be drawn. The Supreme Court held that, in

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[15] *See Clark v. Roemer*, 500 U.S. 653, 646 (1991) (failure to obtain either judicial or administrative preclearance renders the voting change unenforceable); *see also Wise v. Lipscomb*, 437 U.S. 535, 542 (1978) ("A new reapportionment plan enacted by a State . . . will not be considered 'effective as law' until it has been submitted and has received clearance under § 5. Neither, in those circumstances, until clearance has been obtained, should a court address the constitutionality of the new measure.") (citations omitted).

drafting an interim plan, this Court "should take guidance from the State's recently enacted plan" to the extent the legislative policies underlying the plan do not lead to violations of the Constitution or the VRA. *Perez*, 132 S. Ct. at 941. The enacted plan "serves as a starting point" and "reflects the State's policy judgments on where to place new districts and how to shift existing ones in response to massive population growth." *Id.* At the same time, however, this Court must "take care not to incorporate into the interim plan any legal defects in the state plan." *Id.* Thus, where, as here, the State's plan "faces challenges under the Constitution or § 2 of the Voting Rights Act, a district court should still be guided by that plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits." *Id.* at 942.

With regard to the pending preclearance proceedings and § 5 challenges, the Supreme Court noted that the calculus "is somewhat different" because only the D.C. Court may determine whether the state plan complies with § 5 and other courts "may not address the merits of § 5 challenges." *Id.* This Court "must therefore be careful not to prejudge the merits of the preclearance proceedings" and "should presume neither that a State's effort to preclear its plan will succeed nor that it will fail." *Id.* "The need to avoid prejudging the merits of preclearance is satisfied by taking guidance from a State's policy judgments unless they reflect aspects of the state plan that stand a reasonable probability of failing to gain § 5 preclearance." *Id.* And by "reasonable probability" the Supreme Court meant in this context "that the § 5 challenge is not insubstantial." *Id.* The Supreme Court noted that this "standard ensures that a district court is

not deprived of important guidance provided by a state plan due to § 5 challenges that have no reasonable probability of success but still respects the jurisdiction and prerogative of those responsible for the preclearance determination." *Id.*

II. Section 5 claims - Discussion

A. "Not insubstantial"

As explained above, although the D.C. Court has exclusive jurisdiction over the merits of the § 5 challenges to the congressional plan, under the Supreme Court's newly announced standard for this interim plan, this Court must determine whether the claims asserted by the Defendants in the D.C. Court are "not insubstantial." In explaining this standard, the Supreme Court stated that it required a finding "that the relevant aspects of the state plan [stand] a reasonable probability of failing to gain § 5 preclearance" and that the Court should follow legislative policies as set forth in the enacted plan where the § 5 challenges "have no reasonable probability of success." *Perez*, 132 S. Ct. at 942.

The parties dispute how to apply this standard in light of the circumstances of this case.[16] The parties dispute who has the burden of proof, given that the State maintains the burden of proof to obtain preclearance in

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[16] Intervenor Congressman Joe Barton and a number of Plaintiffs urged the Court to await a preclearance decision rather than attempting to apply the "not insubstantial" standard. Docket nos. 621, 644. However, the fact that the Supreme Court provided a standard for the Court to apply before a preclearance ruling is made by the D.C. Court indicates that the Supreme Court did not intend for this Court to await a preclearance decision.

the § 5 case. Texas argues that even though it has the burden of proof under § 5 in the D.C. Court, Plaintiffs should have the burden of proof for purposes of the interim plan because they are seeking to justify changes to the enacted plan.[17] Plaintiffs argue that, consistent with its burden in the D.C. Court to prove that the enacted plan does not violate § 5, Texas should have the burden of proof. This Court need not decide which party bears the burden of proof on a § 5 challenge when drawing an interim map, because none of the § 5 issues in this case turns on which party bears that burden.

The parties further dispute what the threshold should be for determining whether a claim is "not insubstantial." At the time the Supreme Court issued its decision on January 20, the D.C. Court had denied the State's motion for summary judgment on preclearance. Some parties, including the United States,[18] argue that the denial of summary judgment in itself means that the Defendants' claims in the D.C. Court are "not insubstantial." However, as noted by the State, the Supreme Court was aware of the denial of summary judgment at the time of its January 20 decision, and thus presumably would have so stated if the denial of summary judgment should be equated with a conclusion that the claims were "not insubstantial."

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[17] Docket no. 631 at 20.

[18] Docket no. 591 at 5. The United States also argues that any aspect of the enacted plan on which the United States has posed an objection involves a "not insubstantial" § 5 claim. Though Texas does not agree with this point, Texas contends that this Court should give more weight to objections posed by the United States than other parties in the D.C. Court.

In addition, the D.C. Court's summary-judgment decision did not address specific areas of the congressional plan. The Supreme Court noted that this Court was correct to take guidance from the State's plan in areas where there was "no serious allegation" that the district lines had a discriminatory intent or effect, despite the D.C. Court's implication in its summary-judgment opinion that the Plan as a whole suffered from a serious allegation of discriminatory intent. Thus, the Court agrees that the denial of summary judgment alone does not render "not insubstantial" all claims asserted in the D.C. Court, and we will consider each claim to determine whether it is "not insubstantial."

B. Section 5 challenges in the D.C. Court

Shortly after the Supreme Court issued its decision, the D.C. Court conducted its trial on the merits on the § 5 claims, and that entire record has now been submitted in this case. Given the exigencies of time, this Court is unable to review the entire record from the D.C. trial, but has reviewed the post-trial briefing in order to determine whether the claims are "not insubstantial." The Court will therefore summarize the various § 5 claims and issues from that briefing.

In its trial brief,[19] the United States argues that both the benchmark and enacted plans have a total of 10 ability districts, but that minority representation is proportionately decreased (retrogressed) in the enacted plan because minority voters would have the ability to elect in only 10/36 districts in the enacted plan, which is significantly less than the 10/32 ability present in the

[19] D.C. docket no. 203.

benchmark plan.[20] The United States contends that the appropriate inquiry for retrogression is whether the enacted plan is "more dilutive" than the benchmark plan, and one way to assess this is to determine the gap between the actual number of minority ability districts and the number of districts that would be roughly proportional to the minority share of the citizen voting age population ("CVAP").[21] An increase in the gap between the benchmark plan and the enacted plan would be retrogressive.

Applying this measurement, the United States asserts that Black and Hispanic citizens combined constitute 39.3% of Texas's citizen voting age population, which would be approximately 13 (39.3% x 32 seats = 12.6) seats in the benchmark and 14 (39.3% x 36 seats = 14.1) seats in the enacted plan.[22] Thus, if there are 10 minority ability districts in the benchmark plan, there is a proportionality gap of three seats, which is increased to four seats in the enacted plan – *i.e.*, the gap increases by one seat. Accordingly, the United States contends that, to avoid retrogression based on such a gap increase, the enacted

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[20] The United States relied on the expert testimony of Dr. Lisa Handley, who found that Districts 23 and 27 provided minority voters with the ability to elect preferred candidates in the benchmark but not in the enacted plan, but that the enacted plan includes two new minority ability districts (34 and 35). She thus concluded that the degree of minority under-representation increases by one district in the enacted plan and, alternatively, that minority proportionate representation decreased from 31.3% of districts in the benchmark plan to 27.8% of districts in the enacted plan. D.C. docket no. 202 at 9.

[21] D.C. docket no. 203 at 14-15.

[22] D.C. docket no. 203 at 15-16.

plan must have a minimum of 11 minority ability districts (in which case the gap of three seats remains constant).[23]

The United States argues that benchmark CD 23 was an ability district in the benchmark plan,[24] but that Texas eliminated the ability of minority voters in CD 23 to elect preferred candidates in the enacted map. Dr. Handley determined that CD 23's score on the exogenous[25]

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[23] The United States notes that this number does not rest on a determination that benchmark CD 25 provides minority voters with the ability to elect preferred candidates. D.C. docket no: 203 at 16 n.9. The United States does not take the position that CD 25 was an ability district in the benchmark plan.

[24] The United States asserts that the district's very creation in 2006 as a minority opportunity district to remedy the § 2 violation found by the Supreme Court in *LULAC v. Perry*, 548 U.S. at 425-42, is indicative of its status as a protected district under § 5. Further, the United States notes that Hispanics in the district succeeded in electing their preferred candidate to Congress in 2006 and 2008, and that candidate's loss in the 2010 election (the year of the Republican landslide) does not establish that the district lost its ability-to-elect status. D.C. docket no. 203 at 16-17. The United States' expert, Dr. Lisa Handley, also uses the Endogenous Effectiveness Index, which measures the percentage of contests since the district was drawn that the minority-preferred candidate won, to conclude that CD 23 was an ability district in the benchmark plan. An endogenous election analysis for a district measures the ability of minorities to elect minority-preferred candidates for the district itself. Because CD 23 was drawn in 2006, there are only three endogenous election contests to consider – 2006, 2008, and 2010. D.C. docket no. 161-5 (Dr. Handley's Report) at 4.

[25] Exogenous election analysis measures the ability of a set of statewide minority-preferred candidates to carry the congressional district at issue. Report of Dr. Lisa Handley, D.C. docket no. 161-5. "Exogenous elections are elections that are outside of the district at issue. Endogenous elections are elections that involve the district at

effectiveness index drops from 40% to zero in the enacted plan. Similarly, Dr. Alford's estimates show a decline from 46% to 29%, and the Texas Office of Attorney General's analysis indicates a drop from 30% to 10%.[26]

Regarding discriminatory purpose, the United States argues that the congressional plan was adopted with a discriminatory purpose because Texas intentionally used racial means to achieve a preferred partisan outcome. Further, the United States argues, Texas chose not to create any new minority ability districts despite the huge Hispanic population growth, and chose to remove hundreds of thousands of minority voters from districts in which they could elect their preferred candidates under the existing plan. The United States argues that this goal was achieved in part by intentionally splitting a number of cohesive minority communities and elsewhere packing minorities into existing ability districts to avoid creating any such new districts. The United States asserts that this occurred in the DFW area. The United States contends that Texas split precincts to draw boundaries using racial data.[27]

In support of its claim that Texas acted with a discriminatory purpose, the United States relies on several pieces of evidence. The first piece is an email from Eric Opiela to Gerardo Interiano, sent in November 2010 when they were both on staff for Texas House Speaker Joe Strauss. Opiela suggested that they should calculate Spanish Surname Turnout/Total Turnout ratio for all

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issue." *Cottier v. City of Martin*, 445 F.3d 1113, 1121 n.5 (8th Cir. 2006).

[26] D.C. docket no. 203 at 17.

[27] D.C. docket no. 203 at 19.

VTD's[28] for the 2006 to 2010 general elections because "[t]hese metrics would be useful in identifying a 'nudge factor' by which one can analyze which Census blocks, when added to a particular district (especially 50+1 minority majority districts) help pull the district's total Hispanic Pop and Hispanic CVAPs up to majority status, but leave the Spanish Surname RV and TO[29] the lowest" and "[t]his is especially valuable in shoring up Canseco and Farenthold [two Republican incumbents]." The United States further asserts that CD 23 demonstrates that the mapdrawers were successful in achieving Opiela's stated goal because high-performing Hispanic precincts in Maverick County and the South Side of San Antonio were swapped out, and elsewhere precincts with higher Spanish Surname Voter Registration ("SSVR") but lower turnout were swapped in.

The United States further contends that split precincts are the most probative circumstantial evidence of a discriminatory purpose because no partisan data is available below the precinct level, and the 518 split precincts in the congressional plan are "unexplainable on grounds other than race."[30] The United States contends that the congressional plan splits precincts "in a manner that divides racial groups and weakens minority voting strength with alarming consistency, and a political justification does not explain this racially discriminatory

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[28] A "VTD" is a voter tabulation district and is the functional equivalent of a voting precinct.

[29] "RV" stands for "registered voters." "TO" stands for "turnout."

[30] D.C. docket no. 203 at 22.

pattern."[31] The United States asserts that the concentration of split precincts in minority communities will have a disparate impact on minority voters because of expense and voter confusion, resulting in lower minority turnout.

Last, the United States contends that African American members of Congress Eddie Bernice Johnson, Sheila Jackson Lee, and Alexander Green and their districts were treated in a discriminatory manner by the mapdrawers because key economic features were removed from the districts.[32] Each of these representatives' offices was drawn out of their respective districts, and Johnson's home was drawn out of her district. These problems were not remedied despite the members' efforts.[33] In contrast, the United States contends, the evidence shows that Anglo members of Congress were treated preferentially, with even minor requests accommodated and special projects drawn into their districts.[34] At trial, Gerardo Interiano stated that the disparate treatment was mere "coincidence," and the United States asserts that this explanation is implausible.[35]

The Texas Latino Redistricting Task Force asserts that changes to CD 23 were retrogressive in effect and had a discriminatory purpose.[36] The Task Force asserts

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[31] D.C. docket no. 203 at 22.

[32] D.C. docket no. 203 at 26.

[33] D.C. docket no. 203 at 26.

[34] D.C. docket no. 203 at 26.

[35] D.C. docket no. 203 at 26. The NAACP makes similar claims in its post-trial brief. D.C. docket no. 198.

[36] D.C. docket no. 206.

that "Ryan Downton testified that while creating CD 23, he swapped precincts into and out of the district based on Spanish surnamed voter registration and political performance even though he was aware that he might be selecting precincts for inclusion into CD 23 in which Latino turnout was lower than other precincts."[37] And "[d]espite the fact that the population of CD 23 was approximately 149,000 over the ideal district size, Mr. Downton moved a much larger number of 380,677 people out of the benchmark CD 23 [and] moved 231,514 new people into CD 23."[38] The Task Force asserts that, throughout the process, "Mr. Downton reported on his progress to ensure that CD23 would only elect the candidate of choice in one out of ten elections. (FOF at ¶ 291 ("Have it over 59% HCVAP, but still at 1/10.")).")[39]

The Task Force further complains that the enacted plan's "removal of Nueces County from the configuration of Latino opportunity districts in South and West Texas not only purposefully deprives thousands of Latino voters in Nueces County the opportunity to elect their preferred candidate – the change further makes impossible the creation of seven Latino opportunity districts in South and West Texas."[40] The Task Force asserts that Texas could have enacted a plan with 7 ability districts in South and West Texas, but chose not to.

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[37] D.C. docket no. 206 at 10. Ryan Downton was general counsel to the Texas House Committee on Redistricting and was involved in drawing the congressional plan.

[38] D.C. docket no. 206 at 10 (citation omitted).

[39] D.C. docket no. 206 at 10. "FOF" refers to proposed findings of fact filed by the Task Force in the D.C. Court.

[40] D.C. docket no. 206 at 15.

The Gonzalez Intervenors and LULAC argue that the enacted plan is retrogressive because it reduces the number of minority ability districts from 11 to 10, and intentionally dismantles three minority-ability districts (23, 25, and 27).[41] Thus, minority representation is reduced from 34% to 28% of districts, even though minorities accounted for most of the population growth that entitles Texas to four new congressional seats. These parties contend that Texas officials ignored the protections of the VRA and intentionally discriminated against minorities by carving up ability districts. Despite enormous Hispanic population growth and the relatively small increase in Anglo population, they argue, Texas's enacted plan actually decreases the number of Hispanic ability districts by one (from eight to seven) and increases the number of Anglo districts by five.[42]

The Gonzalez Intervenors and LULAC point to the email from Opiela to Interiano revealing a racial purpose behind the configuration of CD 23,[43] the intentional

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[41] D.C. docket no. 207.

[42] D.C. docket no. 207 at 5. According to the brief, between 2000 and 2010, Hispanic population grew from 6.7 million to 9.5 million, a 42% increase; Black population increased by 526,000 (23%) and White population increased by 457,000 (4.1%). *Id.*

[43] D.C. docket no. 207 at 6. The Gonzalez Intervenors and LULAC rely on the expert testimony of Dr. Stephen Ansolabehere to show that CD 23 is no longer an ability district. These parties further contend that the State's goal with regard to CD 23 was "to make CD 23 appear falsely to be a minority-ability district." Id. Looking at the various areas that were kept in CD 23 and those that were moved in and out, the area kept in CD 23 has the highest percent Anglo population, the highest turnout, and the lowest support for minority-preferred candidates; the area removed has the lowest percent Anglo population and highest combined Black and Hispanic

destruction of an effective coalition of Hispanic, African-American, and Anglo voters in CD 25, and the dismantling of CD 27 by moving more than 200,000 Hispanics in Nueces County into an Anglo district where they lose the ability to elect their preferred candidates.

The Gonzalez Intervenors focus on CD25, which they assert is a crossover district that must be recognized as an ability district in a § 5 retrogression analysis. They assert that they have provided extensive, unrefuted evidence of election returns and other information establishing that benchmark CD 25 was an effective crossover district in which Hispanics and Blacks were able to elect the candidates of their choice because of voting cohesion between minorities and because a significant portion of Anglos (but not a majority) consistently voted for the minority-preferred candidate.[44] The Gonzalez Intervenors contend that the dismantling of this effective crossover district constitutes retrogression.

With regard to discriminatory purpose, the Gonzalez Intervenors rely on the following evidence: (1) the statewide disproportionate impact of the plan on minorities[45]; (2) the specific disproportionate impact and

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population, somewhat lower turnout, and highest support for minority preferred candidates; and the area added to CD 23 has the highest percent Hispanic population but the lowest turnout rate and somewhat lower support for minority preferred candidates than the areas taken out. *Id.* This combination of population changes reduced the electoral performance of minority preferred candidates by 3 to 4 %. *Id.* at 7.

[44] D.C. docket no. 207 at 9.

[45] D.C. docket no. 207 at 17. According to the Gonzalez Intervenors, although Anglos constitute approximately 45.3% of the total population of Texas, they are an outright majority of the

ripple effects resulting from the Legislature's discriminatory treatment of Hispanics in Nueces County[46]; (3) the history of discrimination against Blacks and Hispanics in Texas; (4) the specific sequence of events leading to the adoption of the plan; and (5) contemporaneous statements of Legislators and staff demonstrating a discriminatory purpose.

LULAC also contends that the enacted map intentionally fractures minority neighborhoods in the DFW area, specifically focusing on Districts 6, 12, 26, and 33.[47] LULAC notes that each district is bizarrely shaped to unnaturally avoid creation of majority-minority districts in that area and to ensure Anglo-dominated districts. LULAC further contends that CD 30 is packed with excessive minority population and thus "wastes" minority votes. LULAC relies on evidence of historical

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population in 20 of the 36 districts, and a plurality in 3 more, for a total of 64% of congressional districts. And although the statewide percentage of Anglo voters decreased, the number of districts in which Anglos are a majority of the citizen voting age population increased from 22 to 25 (69% of districts).

[46] D.C. docket no. 207 at 20. These parties argue that the Legislature could have chosen to take the Nueces County Hispanic population and use it to help construct a seventh majority Hispanic district in the Rio Grande Valley, but instead chose to remove them from South Texas and put them in an Anglo district where they are effectively stranded. Thus, they argue, this decision eliminated the possibility of creating an additional minority Hispanic district without destroying CD 25 to create CD 35, and also left no flexibility for the creation of an additional Hispanic seat in Harris County. These parties argue that alternative plans did not create these problems.

[47] D.C. docket no. 205 at 7. The Task Force also contends that the State had an improper racial purpose in districting in the DFW area. D.C. docket no. 206 at 16.

discrimination, the unusual process leading to passage of the plan, and contemporary statements by members of the decisionmaking body that exhibit racially discriminatory intent. LULAC contends that even if there are 11 ability districts in the enacted plan, "the new plan would still be retrogressive because the level of representation statewide would be reduced."[48]

In its trial brief,[49] Texas argues that the only proper way to determine retrogression of ability to elect is to use exogenous elections for the benchmark and enacted plans. Because endogenous elections can only be examined for the benchmark district, Texas asserts, "endogenous election analysis does not permit a '*comparison* of a jurisdiction's new voting plan with its existing plan.'"[50] Texas asserts that its functional analysis is preferable to the United States' analysis because it uses more statewide elections weighted toward more recent elections and measures the statewide ability to elect minority-preferred candidates across all districts at issue.[51] Even if the United States' approach is required, the State argues that it is still appropriate to use exogenous elections weighted toward more recent contests.

Applying its statewide functional analysis, Texas argues, the congressional plan does not retrogress

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[48] D.C. docket no. 205 at 17.

[49] D.C. docket no. 201. In its brief, Texas reserved its argument that minority voters have the ability to elect in any district where a single minority group constitutes greater than 50% of the citizen voting age population.

[50] D.C. docket no. 201 at 4 (quoting *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) (emphasis added)).

[51] D.C. Docket no. 201 at 5.

minority voting strength but in fact "substantially improves Hispanic voting strength."[52] Relying on the testimony of its expert Dr. Alford, Texas contends that minority-preferred candidates win 13 additional statewide contests in the enacted plan over the benchmark, which demonstrates that no retrogression occurred. Using the binary approach espoused by the United States requires the same conclusion, Texas asserts. Texas contends that the United States improperly counts CD 23 as an ability district in the benchmark but not the enacted plan, "despite the fact that minority voters elected their candidate of choice less than half the time under both the five- and ten-election exogenous indices."[53] Texas argues that "the United States converts CD23 from non-performing to an ability district based on erroneous endogenous analysis" and its methodology is inappropriate for CD 23 "because it relies on a meager three cherry-picked elections."[54]

Texas further disputes the Gonzales Intervenors' claim that CD 25 is a protected ability-to-elect district in the benchmark plan, asserting that the United States has not taken that position.[55] Texas contends that CD 25 is not a protected coalition or crossover district because (1) it has an Anglo CVAP over 60%, a Hispanic CVAP ("HCVAP") of 25%, and a Black CVAP under 10%; (2) Anglos do not vote as a bloc to defeat minority-preferred candidates; and (3) minorities do not vote cohesively in

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[52] D.C. docket no. 201 at 15.

[53] D.C. docket no. 201 at 16.

[54] D.C. docket no. 201 at 16.

[55] D.C. docket no. 201 at 16 ("Neither Texas nor the United States takes that position.").

Democratic primaries.[56] Accordingly, Texas contends, CD 25 does not factor into the retrogressive effect analysis.[57]

With regard to the discriminatory purpose inquiry under § 5, Texas emphasizes that both a discriminatory purpose and effect are required to find a violation (*i.e.*, disparate impact is alone insufficient). Thus, Texas argues, the inquiry must be whether the Legislature enacted the plan because of its effect on race, not "in spite of" its known effects on race. Texas contends that the districting decisions have race-neutral explanations, and thus discriminatory purpose cannot be found even if the Legislature knew that the race-neutral purposes would disparately impact racial minorities. Texas asserts that the Defendants rely on four principal arguments to support the purposeful discrimination claim: (1) the lack of proportional representation; (2) the configuration of CD 23; (3) the configuration of CD 26; and (4) alleged disparate treatment of Black members of the congressional delegation.[58]

With regard to the lack of proportional representation, Texas argues that proportional representation is expressly not required by the VRA. Thus, Texas contends, once it drew one additional minority opportunity district that it believed to be

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[56] D.C. docket on. 201 at 16.

[57] Texas further argues that the D.C. Court should reconsider its prior decision that coalition and crossover districts are protected ability districts for § 5 purposes in light of the Supreme Court's decision in *Perry v. Perez*. Texas argues that such districts are not protected, but even if they are, the minority coalition must be shown to vote cohesively in the primary.

[58] D.C. docket no. 201 at 26.

required, it lacked a "strong basis in evidence" to conclude that consideration of race was "reasonably necessary" to satisfy either § 2 or § 5 of the VRA, and it risked violating the Equal Protection Clause if it sought to create additional districts based on race.[59]

Texas disputes the allegations related to CD 23 by arguing that (1) Downton testified that he did not use voter turnout statistics to draw CD 23; (2) there is no evidence Opiela played a role in drawing CD 23; (3) Downton testified that he had the legitimate goal of protecting a Latino Republican incumbent (Canseco); (4) Downton could not target low-turnout Hispanics because RedAppl[60] does not have such functionality; and (5) the evidence shows that Hispanics in enacted CD 23 are actually more likely to turn out on election day.[61]

Texas further contends that it did not draw the CD 26 "lightning bolt" in DFW with a discriminatory purpose, noting that the benchmark plan already contained a

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[59] D.C. docket no. 201 at 26. During redistricting and throughout the litigation, Texas has maintained the position that § 2 does not require the State to draw minority coalition districts. Thus, the State steadfastly refused to create any coalition districts, and the State's arguments are made entirely in the context of minority opportunity districts in which one single minority or language group constitutes a working majority of the population of the district. As discussed, *infra*, the Court is unable to conclude that Plaintiffs are likely to succeed on those § 2 claims that are based on a coalition of minority voters.

[60] RedAppl is the State's districting software program. As described by the Supreme Court in *Bush v. Vera*, 517 U.S. 952, 960 (1996), "REDAPPL permit[s] redistricters to manipulate district lines on computer maps, on which racial and other socioeconomic data [are] superimposed."

[61] D.C. docket no. 201 at 27-28.

southern protrusion extending from Denton into Tarrant County, which was not disturbed by the Supreme Court in *LULAC*, and that this protrusion was narrowed to accommodate requests from Republican U.S. Representative Kay Granger and Democratic State Representative Marc Veasey. Texas argues that both in the benchmark and enacted plan, the protrusion contains a high concentration of Democratic voters consistent with a political purpose. Texas contends that because the configuration of the district is equally consistent with a race-neutral purpose, the fact that it may have disparately affected minorities does not establish impermissible purpose.

Last, with regard to the allegations that the Legislature intentionally snubbed minority-preferred members of Congress, Texas contends that the Legislature attempted to accommodate requests from lawmakers, but did not make a concerted effort to solicit redistricting preferences of representatives from either party. Because the mapdrawer did not know where the district offices were located, Texas contends that at most it "was guilty of blithe indifference to the wants of certain Congressmen," which does not violate the Constitution or the VRA.

III. Plan C226 - a proposed compromise map

In order to permit the primary elections to go forward in a timely manner, some Plaintiffs and Intervenors conferred and developed a compromise map that they submitted to the Court for consideration. The compromise map attempts to address those § 5, § 2, and Fourteenth Amendment claims that are "fairly at issue" and thus within the scope of this Court's remedial

authority. The map is endorsed by the Texas Latino Redistricting Task Force and by Congressmen Cuellar and Canseco.[62] C226 is opposed by Intervenor Congressman Joe Barton.[63] It is also opposed by MALC in part[64] and by the Rodriguez Plaintiffs, Quesada Plaintiffs, LULAC, Texas NAACP, and the African-American Congressional Member Plaintiffs.[65] The Court has independently reviewed as much of the record as possible and it has carefully evaluated all of the arguments in opposition to Plan C226 in deciding whether it would be an acceptable interim plan.

Although, as noted, several parties have urged the Court to wait for a decision on preclearance from the D.C. Court, the Court heard testimony from the parties that in order to proceed with a May 29 primary, a map needed to be in place by March 3. Thus, the Court concluded that it could not wait for a decision from the D.C. Court without further delaying the primary and causing substantial

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[62] Docket nos. 606, 610, 613, 676. The Task Force Plaintiffs note that C226 does not necessarily address or resolve all of their claims, but they agree that it is an acceptable compromise to permit the primary elections to occur without further delay.

[63] Docket no. 609, 621. Congressman Barton urges the Court to wait for a preclearance decision from the D.C. Court before drawing any interim map. In the alternative, Barton also submits a proposed interim map, C227.

[64] Docket no. 671 (arguing that CD 23 in C226 incorporates legal defects from the enacted plan). Plaintiff MALC states that C226 adequately addresses its claims in some areas, but it is not the only way to remedy the alleged constitutional and statutory violations. Docket no.665.

[65] Docket no. 659; docket no. 664 (discussing objections to CD 33 and proposed alternative plan).

hardship to the Republican and Democratic parties, which have scheduled their conventions for June. Releasing a map in time for a unified May 29 primary avoids a split primary and the resulting costs and burdens on the counties and political parties, which must administer and conduct the elections.[66]

A. Analysis of C226

The Court has independently evaluated the proposed compromise map, C226, and concludes that it sufficiently resolves the "not insubstantial" § 5 claims and that no § 2 or Fourteenth Amendment claims preclude its acceptance under a preliminary injunction standard. The Texas Legislative Council, however, has identified what appear to be inadvertent intrusions of congressional districts into six different counties. These intrusions consist of either one or at most several census blocks and all contain either no people or very few people. The boundaries between districts otherwise follow the county lines in the areas of the intrusions. Elimination of these intrusions can be accomplished with minimum population deviation and avoids the possibility that a county will have to fashion a voting precinct consisting of no people or very few people because of a map-drawing error. Accordingly, the Court finds that Plan C235, which corrects these technical

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[66] *See* January 27, 2012 hearing transcript, in which the parties presented evidence of logistical difficulties with having an election in June, since many public facilities and schools are closed, the significant cost to political parties who have already contracted for and placed deposits on Convention facilities in June, and the extremely high (and unbudgeted) costs to counties of a split primary, and corresponding voter fatigue. *See also id.* Tr. 148 (testimony that a split primary would cost Bexar County an estimated additional $375,000).

errors contained in Plan C226, can be adopted as the interim plan.

B. District 23

The Court finds that the § 5 retrogressive effects claim with regard to CD 23 is not insubstantial. The effects prong requires a comparison between CD 23 in the benchmark and CD 23 in the enacted plan. The parties vigorously dispute the appropriate method for determining whether CD 23 was or is an ability district and for comparing the status of CD 23 between the two plans. The United States endorses using endogenous election data for benchmark CD 23, and notes that six different Circuit Courts of Appeals have determined that endogenous elections are the most probative and relevant contests when assessing racially polarized voting.[67] The United States further asserts that Texas's argument in favor of exogenous elections conflicts with its expert's (Dr. Alford) previous statements that endogenous elections are more probative than exogenous elections.

Texas argues that because endogenous election analysis can only be conducted for the benchmark plan, it does not fairly permit a comparison with the enacted plan, and thus exogenous elections, which can be conducted for both plans, should be used. Determining which method to use for making the retrogressive effects comparison between benchmark and enacted plans is an issue that must be resolved by the D.C. Court. The Court finds that whether CD 23 is effectively retrogressed is a not insubstantial § 5 claim.

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[67] D.C. docket no. 203 at 3-4 (listing cases).

Because the § 5 retrogressive effects claim regarding CD 23 is not insubstantial, the Court cannot incorporate enacted CD 23 into the interim plan. C235 attempts to adjust CD 23 to account for the § 5 claims. The parties dispute the degree to which it has effectively done so. The Texas Latino Redistricting Task Force asserts that C235 restores CD 23 insofar as the win-loss record of Latino preferred candidates is similar to benchmark CD 23. The Task Force analyzed 12 racially contested exogenous elections from 2002-2010 in which Latinos sought to elect a Latino candidate, and on average the Latino preferred candidates in CD 23 in Plan C235 garnered within half a percentage point (less) of the support they garnered in benchmark CD 23.[68] Congressman Canseco also argues that CD 23 has been restored.[69]

MALC and other Plaintiffs contend that CD 23 has not been fully restored because its actual performance in terms of votes is less than it was in the benchmark. Specifically, these Plaintiffs contend that in almost all elections, the choice of the Hispanic voters does slightly more poorly than in the benchmark.

The Court has carefully considered these arguments. The State has demonstrated that election performance has been restored to the benchmark level of 3 out of 10 racially contested exogenous general elections.[70] A report prepared by the Texas Legislative Council also demonstrates that performance levels in terms of win-loss numbers have been restored to benchmark levelsunder

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[68] Docket no. 638 at 35 (and docket no. 638 Ex. S).

[69] Docket no. 676.

[70] Docket no. 675 at 3.

the United States' preferred methodology developed by Dr. Handley. And the Texas Latino Redistricting Task Force's analysis demonstrates that CD 23 has a comparable win-loss record to the benchmark district. The Court therefore concludes that it has been sufficiently restored to benchmark level, even if the margin of victory has slightly decreased.

Because C235 restores CD 23 to benchmark performance, and Plaintiffs argued that CD 23 in the benchmark was an opportunity district, C235 also resolves the Plaintiffs' § 2 claims premised on the alleged failure to include 7 Latino opportunity districts in South/Central/West Texas. Accordingly, the Court need not consider the merits of those claims, and makes no ruling on whether CD 23 is an opportunity district in the enacted map. The Court also need not decide whether the § 5 discriminatory purpose claims related to CD 23 are not insubstantial.

C. Statewide Retrogression (United States)

As noted above, to avoid an increase in the "gap," the United States asserts that any interim map must have at least 11 ability districts. The United States further asserts that retrogression is measured on a state-wide basis, so any retrogression in a particular district can be cured by creating new districts anywhere in the State.[71] The Court need not decide whether this claim is "not insubstantial" because C235 addresses the United States' concerns by including 11 districts that the United States would consider ability districts.

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[71] Docket no. 630 at 2.

D. Dallas-Fort Worth area

C235 also makes substantial changes to the Dallas-Fort Worth area. As noted by the Supreme Court in *Perry v. Perez*, aspects of the enacted map's configuration of the Dallas-Fort Worth area "appear to be subject to strong challenges in the § 5 proceeding." *Perez*, 132 S. Ct. at 944. In making this statement, the Court cited to a portion of the United States' brief in the D.C Court, in which it asserted that "the minority population [in DFW] was purposely manipulated to decrease current and future minority voting strength" and that "the State has pulled strangely-shaped minority population areas out of certain districts in order to submerge them in larger Anglo populations and to reduce minority voting strength."[72] The United States further asserted that "[t]he data utilized in making some of these changes were race-based, as opposed to partisan."[73] The Supreme Court also cited to exhibits showing that the CD 26 "lightning bolt" extending into CD 12 contains concentrated Hispanic populations.

In its trial brief in the D.C. Court, the United States asserts that the intentional cracking of minority populations is clearest in CD 6, in which there are 39 VTD splits in the "finger" that reaches up from majority Anglo Ellis and Navarro Counties to remove large concentrations of African-American and Hispanic population from Dallas and Tarrant Counties, and 28 of the 39 split VTDs are in majority minority precincts.[74]

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[72] D.C. docket no. 79-2 at 36, 38.

[73] D.C. docket no. 79-2 at 38.

[74] D.C. docket no. 203 at 22.

These splits also divide minority communities of interest in Arlington, Cedar Hill, and Duncanville into three different congressional districts.[75] Similarly, in CD 26, there are 49 split precincts, 38 of which are within the "lightning bolt" coming down into Tarrant County.[76] The United States asserts that the eastern edge of the lightning bolt divides African-American communities from Hispanic communities according to race, and because the area is homogeneously Democratic, the split could not have been guided by political data.[77]

LULAC also argued in the D.C. Court that the enacted map intentionally fractures minority neighborhoods in the DFW area, specifically focusing on districts 6, 12, 26, and 33.[78] LULAC notes that each district is bizarrely shaped to unnaturally avoid creation of majority-minority districts in that area and to ensure Anglo-dominated districts. The D.C. Defendants further contend that CD 30 has been "packed" with additional minority population that was not necessary for minorities to continue to elect their preferred candidate, which intentionally "wastes" minority votes.[79]

The D.C. Defendants assert classic "cracking" and "packing" intentional vote dilution discrimination

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[75] D.C. docket no. 203 at 22.

[76] D.C. docket no. 203 at 23.

[77] D.C. docket no. 203 at 23. The United States makes these same arguments before this Court in support of its position that there is a reasonable probability that Texas will fail to gain preclearance in this area. Docket no. 630 at 14.

[78] D.C. docket no. 205 at 7.

[79] D.C. docket no. 205 at 8.

claims.[80] Although minorities are more than 50% of the combined population of Dallas and Tarrant Counties, in only two of the eight districts in the enacted plan that include parts of Dallas and Tarrant Counties do minorities make up more than 50% of the voting age population.[81] Although the D.C. Defendants contend that populations were split along racial lines to dilute minority voting strength, Texas contends that disparate impact does not establish discriminatory intent and that there are race-neutral explanations for the district lines. Texas

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[80] *See Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993). In *Voinovich*, the Supreme Court noted that "[d]ividing the minority group among various districts so that it is a majority in none may prevent the group from electing its candidate of choice: If the majority in each district votes as a bloc against the minority candidate, the fragmented minority group will be unable to muster sufficient votes in any district to carry its candidate to victory." *Id.* at 153. This is "cracking" the minority population. The Court further described how "packing" dilutes minority voting strength: "A minority group, for example, might have sufficient numbers to constitute a majority in three districts. So apportioned, the group inevitably will elect three candidates of its choice, assuming the group is sufficiently cohesive. But if the group is packed into two districts in which it constitutes a super-majority, it will be assured only two candidates." *Id.* at 153-54.

[81] In CD 6, Black plus Hispanic voting age population is 51.5% and in CD 30, the allegedly packed district, Black plus Hispanic voting age population is 81.5%. In districts 5, 12, 24, 26, 32, and 33, Black plus Hispanic voting age population is between 30.3% and 35.5%. Further, there is only one district in which Blacks and Hispanics make up more than 40% of the citizen voting age population, and they make up 74% of that district (CD 30). Black plus Hispanic citizen voting age population is 24.8% in CD 5, 38.8% in CD 6, 28.3% in CD 12, 21.2% in CD 24, 22.2% in CD 26, 23.3% in CD 32, and 25.9% in CD 33.

argues that it engaged in political gerrymandering, and that it may do so regardless of its awareness of an adverse effect on minorities. Texas further asserts that splitting precincts is permissible and there is no basis for concluding that split precincts are evidence of an impermissible racial purpose.

More specifically, Texas argues that the CD 26 "lightning bolt" is similar to the one in the benchmark, and points to a political shading exhibit that demonstrates that the "lightning bolt" contains high concentrations of Democrats, who just happen to be minorities. However, Texas's post-trial briefing fails to counter Plaintiffs' allegations with regard to CD 6 and CD 33, or the alleged packing of CD 30. Although it is difficult to tell whether lines were drawn on partisan or racial considerations, the high number of split precincts in the protrusions increases the likelihood that the mapdrawers were focused on race, because partisan voting data is not available below the precinct level. Further, Texas has not offered any explanation why the precincts were split or demonstrated that political explanations are more likely than racial ones. Whether the district lines are better explained by politics or racial considerations is a not insubstantial issue that must be decided by the D.C. Court. Accordingly, this Court may not incorporate the enacted plan's configuration of DFW districts.

C235 attempts to address the § 5 claims that are not insubstantial in its configuration of DFW districts. The Latino Task Force contends, with no objection from the State, that C235's DFW configuration addresses the § 5 claims by modifying districts 6, 12, 26, 30, and 33 from the enacted plan. Specifically, it withdraws the encroachments into minority communities from the Anglo

districts surrounding DFW, including the CD 26 "lighting bolt" into CD 12 and the encroachments from CD 6 and CD 12 into minority areas. "The population left behind in Dallas and Tarrant Counties is encompassed" by the new CD 33, and "CD 33 is moved eastward to fill in the space created by retracting CDs 6, 12, and 26 towards their population bases."[82] The Court further notes that the packing allegations are addressed, as the minority population of CD 30 is decreased.[83]

C235 proponents note that it is not possible to simply undo the alleged discrimination by returning to the benchmark because of population growth and the addition of new seats.[84] The Latino Task Force contends that the DFW configuration follows traditional redistricting criteria: accommodating the fastest population growth in the region and accommodating the wishes of congressional incumbents.[85] Specifically, the configuration accommodated the desires of congressional incumbents to maintain their population bases and geographic areas of special concern. Further, the borders of CD 33 are drawn to leave CD 24 unchanged from the enacted map, to work with the existing boundaries of CD 32 in Dallas County, and to make minimal changes to CD 30 except as to accommodate claims from the incumbent.

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[82] Docket no. 638 at 37-38.

[83] According to the NAACP's trial brief in the D.C. Court, benchmark CD 30 was 76.7% Hispanic plus Black voting age population, and enacted CD 30 was 81.5% Hispanic plus Black voting age population. D.C. docket no. 198 at 11. According to the Red-100 report prepared by the Texas Legislative Council, CD 30 in Plan C235 is 75.9% Hispanic plus Black voting age population.

[84] Docket no. 660 at 4.

[85] Docket no. 638 at 37.

C235 proponents note that the changes to the DFW area actually make the districts more compact as a whole, that race did not predominate, and that CD 33 reflects population growth.

The Court concludes that CD 33 is not a minority coalition district and was not drawn with the intention that it be a minority coalition district. Opponents of the compromise map argue that it does not go far enough to cure the fragmentation, especially with regard to African Americans, and suggest a plan where "all of the key Hispanic and African American neighborhoods in Fort Worth are united into CD33."[86] However, the interim plan must address the allegations of discrimination without going beyond them. C235 adequately does so. Thus, the lightning bolt and other incursions are removed, but it would be inappropriate to intentionally create a coalition district on the basis of race or otherwise intentionally unite populations based on race. The contours of CD 33 are a result of addressing the "not insubstantial" § 5 claims of cracking and packing and the application of neutral redistricting criteria. Thus, although race was necessarily considered in drawing CD 33 to some degree, the use of race was appropriate to remedy the alleged race-based discrimination that occurred and does not exceed what is constitutionally permissible.

The Court finds that C235 adequately resolves the "not insubstantial" § 5 claims but goes no further than required under *Perry v. Perez*. The Court need not analyze Plaintiff's Fourteenth Amendment claims related to DFW because they are resolved by C235.

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[86] Docket no. 659 at 13.

Further, the Court cannot conclude at this time that Plaintiffs are likely to succeed on the merits of their claim that § 2 requires a Latino opportunity district in DFW. Only one demonstration map contained a district with a majority Hispanic citizen voting age population (C190), and that district was not reasonably compact and would not likely survive strict scrutiny under the Supreme Court's equal protection jurisprudence. All other demonstration maps contained either inadequate Latino opportunity districts in terms of Hispanic citizen voting age population or coalition districts. As noted below, the Court is unable to conclude at this time that Plaintiffs are likely to succeed on their § 2 claims premised upon coalition districts.

E. Districts Represented by African-American Congresspersons

C235 makes changes to CDs 9 and 18 in the Houston metropolitan area and CD 30 in Dallas to address claims that the Legislature intentionally discriminated against the three African-American plurality and majority districts (which are also represented by African Americans). The United States contends that there is a reasonable probability that Texas will not gain preclearance regarding these districts because they were drawn with discriminatory purpose.[87] The United States asserts that substantial evidence was presented at the D.C. trial that the map drawers removed economic engines from these districts and had drawn members' offices out of each of their districts. In contrast, minor requests by Anglo Members of Congress were

[87] Docket no. 630 at 14-15.

accommodated, with one Member asking for a San Antonio country club to be put in his district (Rep. Lamar Smith), another wanting his grandchildren's private school in his district (Rep. Kenny Marchant), and still another asking that her campaign office be moved back into her district (Rep. Kay Granger).[88] That said, at least one Anglo Congressman, Lloyd Doggett, had his entire district dismantled in a manner that may unseat him, and was arguably treated worse than were the African American members.[89]

The United States asserts that there is a reasonable probability that Texas will not gain preclearance because it fails to adequately explain this disparate treatment, and its claim that the disparate treatment was merely coincidental is implausible. Texas itself has urged the Court to give greater deference to objections made by the United States in the preclearance proceedings. The United States contends that the claims related to the unequal treatment of minority districts represented by African-American members of Congress are "not insubstantial."[90] The Court agrees – though Texas contends that any disparate treatment was simply

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[88] The NAACP makes similar claims in D.C. and in this Court. In docket no. 625, the NAACP and the Individual Representatives contend that "the State redrew districts 9 and 18 so as unnecessarily to replace core minority areas with areas slated for Anglo population growth and thereby diminish minority voting strength" and removed "economic generators from each Black congress member's district so as to reduce the voters' influence, and remove[d]from each the district office that provides services for minority voters."

[89] Lloyd Doggett does not represent a majority minority district.

[90] Docket no. 630 at 15.

inadvertent, the mapdrawers took care to accommodate even minor concerns of Anglo congresspersons and failed to ensure that any requests of the three African-American members were considered or accommodated. Whether the disparate treatment was purposeful or inadvertent is a not insubstantial issue to be resolved by the D.C. Court.

C235 attempts to provide an interim remedy to resolve these complaints by redrawing the districts to include member offices and homes, and to restore economic engines to the district. Though Rep. Johnson has complaints about other areas being removed from CD 30, the Court cannot ensure that all requests are accommodated. Rather, C235 seeks to remedy the alleged discrimination that occurred. Insofar as C235 is not purposefully discriminatory and is not alleged to be retrogressive with regard to these districts, the Court cannot remedy all asserted deficiencies in the districts under C235.

F. Central Texas/CD 25/CD 35

C235 retains the configuration of CD 35 and CD 25 from the enacted plan. It is undisputed that much of Texas's overall population growth occurred in Bexar County and Travis County and areas along the I-35 corridor. Therefore, it is unsurprising that the Legislature's enacted map placed a new district in that area – CD 35. CD 35 connects communities in Austin/Travis County and San Antonio/Bexar County, and the northern portion of CD 35 includes the bulk of the Hispanic minority population in Austin/Travis County that was formerly in CD 25. It is undisputed that CD 35 is a Latino majority district.

Certain Plaintiffs, but primarily the Rodriguez Plaintiffs, contend that CD 35 is an impermissible racial gerrymander, and that the State impermissibly discriminated against minority voters in the way that minorities in Travis County and former CD 25 have been treated in the enacted map. In the D.C. Court, the Gonzalez Intervenors assert that benchmark CD 25 was a protected crossover district, and thus its presence must be factored into the retrogressive effects analysis.

Even though the Supreme Court has recognized the benefits of crossover districts in achieving the goals of the VRA, § 2 does not mandate preserving crossover districts. *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009). Further, even if the D.C. Court concludes that benchmark CD 25 was a protected crossover district under § 5, CD 35 includes the bulk of the Travis County minority Hispanic population from CD 25, and its creation potentially offsets the loss of CD 25 for Hispanics so long as it is an appropriate § 2 district and an ability district for purposes of § 5.

The Latino Task Force contends that CD 35 is a new Latino opportunity district for purposes of § 2 and a Latino ability district for purposes of § 5. The Latino Task Force argues that the creation of an additional Latino opportunity district was required by § 2 (because 7 Latino opportunity districts are required for South/Central/West Texas), and that CD 35 is an appropriate § 2 district because it satisfies all *Gingles* criteria.[91]

Whether CD 35 crosses the line from a permissible § 2 district to an impermissible racial gerrymander is a close call. A racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is

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[91] Docket no. 638 at 36.

constitutionally suspect, even if the reason for the racial classification is benign or remedial. *Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996). As explained by the Supreme Court,

> [T]hose who claim that a legislature has improperly used race as a criterion, in order, for example, to create a majority-minority district, must show at a minimum that the "legislature subordinated traditional race-neutral districting principles . . . to racial considerations." Race must not simply have been "*a* motivation for the drawing of a majority-minority district," but "the '*predominant* factor' motivating the legislature's districting decision." Plaintiffs must show that a facially neutral law is "'unexplainable on grounds other than race.'"
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> The Court also has made clear that the underlying districting decision is one that ordinarily falls within a legislature's sphere of competence. Hence, the legislature "must have discretion to exercise the political judgment necessary to balance competing interests," and courts must "exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race."

Easley v. Cromartie, 532 U.S. 234, 241-42 (2001) (citations omitted) (emphasis in original). Thus, to trigger strict scrutiny, Plaintiffs must show that race was the "predominant" consideration in drawing the district lines such that the Legislature subordinated traditional race-neutral districting principles to racial considerations. *Bush v. Vera*, 517 U.S. 952, 959 (1996) (plurality opinion).

The State argued to the D.C. Court in its motion for summary judgment that CD 35 is a minority opportunity district.[92] Further, Ryan Downton, the lead person in drawing the original congressional plan (C125), testified that he purposefully drew CD 35 as a Hispanic majority district. Tr. 916.[93] Downton further testified that he took the "idea" of CD 35 "from the map that MALDEF submitted to us," which "was trying to create a Hispanic majority district in central Texas." Tr. 916; *see also* Tr. 918 ("When we drew the map originally, we were focused on getting District 35 above 50 percent of HCVAP."); Tr. 989 ("we were trying to create a Hispanic majority district"). This testimony establishes that a primary goal[94] in drawing CD 35 was the creation of a Hispanic majority district. However, intentional creation of a majority minority district is insufficient, standing alone, to trigger strict scrutiny. *Vera*, 517 U.S. at 958-59.

The State argues that non-racial factors also shaped CD 35, including placing the district where the population growth occurred and partisan politics (particularly, targeting Congressman Lloyd Doggett). Thus, this

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[92] D.C. docket no. 41.

[93] "Q: And was it your understanding that one of the objectives of the legislature was to try to create a new citizen voting age population majority district for Hispanics in Texas? A: Yes. I was directed to do that."

[94] The evidence establishes that Downton was responsible for the original configuration of CD 35 and for the subsequent changes that were made to it. As the actual mapdrawer, Downton's state of mind and decisionmaking appears to be the most relevant evidence concerning the extent to which race played a role in determining district lines.

appears to be a "mixed motive" case as described by a plurality of the Court in *Bush v. Vera*, 517 U.S. at 959.

In a mixed motive case, determining when traditional districting criteria have become subordinated to race is highly fact specific and difficult. For example, although CD 35 in the enacted plan joins populations in Travis County and Bexar County over 80 miles apart, the benchmark plan divides Travis County among three congressional districts, joining portions of Travis County with Bexar County in CD 21 and portions of Austin/Travis County with Houston/Harris County in CD 10 that are even farther apart. Congressman Lloyd Doggett and Travis County Democrats appear to have been targeted by the Republican-controlled Legislature, with the result being further division of Austin and Travis County into five congressional districts to ensure that Democratic voters are contained in majority-Republican districts.[95]

Though CD 35 is not particularly compact, the VRA does not require compact districts. Nor is it as non compact or bizarrely shaped as other districts the Supreme Court has found to be unconstitutional. Nevertheless, the Supreme Court has stated that bizarre shape is not required to invoke strict scrutiny. *Miller v. Johnson*, 515 U.S. 900, 912 (1995) ("Our observation in *Shaw* of the consequences of racial stereotyping was not meant to suggest that a district must be bizarre on its face

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[95] For example, an email sent from Eric Opiela to Rep. Lamar Smith and Gerardo Interiano on December 17, 2010 contained an apparent online discussion of a demonstration map, the "centerpiece" of which was "the 8-way split of Austin" such that Doggett "runs in a 58 percent McCain district no matter what." Docket no. 323 (part 2) at 24.

before there is a constitutional violation."). However, "where the district is not so bizarre on its face that it discloses a racial design, the proof will be more 'difficul[t].'" *Id.* at 914.

In *Bush v. Vera*, racial criteria had a qualitatively greater influence on the drawing of district lines than race-neutral criteria, 517 U.S. at 969, and race predominated over other districting criteria in determining the district's boundaries, *id.* at 970-71. Specific portions of boundary lines in districts found unconstitutional have been "tailored perfectly to maximize minority population," *id.* at 971, whereas Plaintiffs in this case have not convinced the Court at this stage that district lines in CD 35 were manipulated to such an extreme degree.

In their briefing, some Plaintiffs complain that CD 35 has 100 precinct cuts, but they point to only two specific precinct cuts in Travis County where racial considerations appear to have controlled. David Butts testified about (1) the splitting of precinct 433 to divide St. Edward's University to place the dorms (with large Hispanic student population) in CD 35[96] and the administration building in CD 21; and (2) and the splitting of precinct 440 to include an arrowhead shape containing the Riverside apartments within CD 35. Tr. 1199.

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[96] Tr. 1197-98. *See Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 670 (5th Cir. 2009) (noting that "it is obviously questionable whether splitting members of geographically contiguous communities in interest, *i.e.*, the colleges, into separate constituencies would have been legally satisfactory" and "[a]ny plan that split USM into multiple wards, furthermore, would be highly suspect on its face").

Mr. Butts further noted that in the northern part of CD 35 "they split through [precinct] 141, which is heavily minority, which is – let's see, 141 right there to go to here and go up into this area right here which is heavily Hispanic and black. Now, the interesting thing is that 140 is heavily Hispanic also. Not as heavy as this precinct, but they didn't reach up and grab that one. I'm not sure why, but they didn't." Tr. 1195. And he testified that "you have Hispanics also going into Congressional District 10." *Id.* Thus, this testimony indicates that Hispanics were both included and excluded from CD 35. Butts further testified that the "squiggle" at the northern part of CD 35 is a substantial Hispanic population, Tr. 1196, which corresponds with Downton's testimony that the "squiggle" was included to increase Hispanic population.[97] However, racial shading exhibits demonstrate that the "squiggle" both includes and excludes areas with substantial Hispanic population. Thus, Plaintiffs' assertion that the Legislature "went to extreme lengths to gather in Hispanic population" is not fully supported by the evidence.

In addition, part of CD 35's unusual shape is the 50-mile long, 3-mile wide corridor running along I-35 that joins Travis and Bexar Counties. However, the evidence indicates that CD 35 was originally much wider along this portion, and the narrowing was the result of a request by State Representative Kuempel (R), who lives in Guadalupe County and asked that the mapdrawers keep as much of Guadalupe County whole as possible. Downton

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[97] Tr. 989 ("If that is a Hispanic area, and I think it is likely that it is, then, yes, it would have been included in District 35 as we were trying to create a Hispanic majority district.").

testified that he put Guadalupe County in CD 15 to accommodate this request. Though Guadalupe County was not in fact kept whole, the Court is unaware of any evidence explaining why a small, predominantly Anglo portion of Guadalupe County was kept in CD 35, and thus cannot determine whether there was a racial or non-racial reason.[98]

Thus, the Court is unable to conclude at this time that Plaintiffs have shown "intensive and pervasive use of race" or that the district's shape "was essentially dictated by racial considerations." *Vera*, 517 U.S. at 972-73. Accordingly, the Court does not find that Plaintiffs are likely to succeed on their claim that CD 35 is subject to strict scrutiny. Nor have Plaintiffs demonstrated a substantial likelihood that CD 35 would fail a strict scrutiny analysis if strict scrutiny applies.

The Court is unable to conclude that Plaintiffs have made the necessary showing on the claims relating to the dismantling of CD 25. As a legal matter the Supreme Court has recognized that if "a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009). As a factual matter, however, the Court cannot conclude at this time that the dismantling of CD 25 was motivated by a discriminatory purpose as opposed to partisan politics.

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[98] According to statistics provided by the Texas Legislative Council (Report Red-100), 17% of the population of Guadalupe County is in CD 35 and 83% is in CD 15. The portion ofCD 35 that reaches into southern Guadalupe County picks up 22,845 people, including 5,844 Hispanics.

The Court recognizes the complaints of African-American voters that their voting ability is retrogressed in the enacted map by the loss of benchmark CD 25, which they assert is a functioning crossover district.[99] However, serious and difficult questions remain to be decided in the D.C. Court regarding whether (1) African-American voters, in coalescing with other voters, had an ability to elect the candidate of their choice in benchmark CD 25,[100] (2) assuming that they did, whether such ability would be protected under § 5, and (3) assuming it would, whether there was in fact retrogression in the enacted map.[101] The

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[99] The State previously characterized CD 25 as a crossover district. Docket no. 457 at 19 ("CD 25 is a crossover district") and n.9 (defining a crossover district as "a district in which African-Americans or Latinos make up less than 50% of voters but can usually elect their candidates of choice with reliable crossover voting by members of the Anglo majority")).However, the State now contends that benchmark CD 25 was not a crossover district.

[100] The Intervenors' experts have opined that CD 25 should be counted as a minority ability district because it is a district in which minority voters have the ability to elect candidates of their choice to Congress. Rebuttal Report of S. Ansolabehere at 5, 15 (D.C. docket no. 155; D.C. Trial Exh. 724)(CD 25 is a district in which minorities have the ability to elect their preferred candidates and it must be included in an analysis of retrogression); Supp. Expert Report of A. Lichtman at 6, ¶ 10 (D.C. docket no. 152 and D.C. Trial Exh. 372)("There is an additional district in C100 that should also be counted as a district that provides minority voters the ability to elect candidates of their choice to Congress. That is Congressional District 25, in Travis County.").

[101] See Rebuttal Report of S. Ansolabehere at 6, D.C. docket no. 155; D.C. Trial Exh. 724)("Plan C185 dismantles CD 25. The result of this dismantling and changes in other district boundaries is to reduce the number of Congressional Districts in which Blacks and Hispanics have the ability to elect their preferred candidates from 11

Court is unable to predetermine how the D.C. Court may ultimately resolve these difficult issues. In the interim, however, C235 makes changes to DFW that potentially offset the loss of African American voting strength in CD 25. Thus, the Court concludes that the substantial changes to the enacted map that would be required by attempting to preserve benchmark CD 25 are not justified at this time. For purposes of an interim plan, the Court concludes that C235 adequately addresses the claims relating to the Central Texas districts.

G. CD 27/Nueces County/opportunity districts in South/West Texas

C235 also sufficiently addresses Plaintiffs' claims related to the number of opportunity districts in South/West Texas. Plaintiffs challenge enacted CDs 27 and 34, arguing that the State's decision to move Nueces County from a Latino opportunity district (benchmark CD 27) to a largely Anglo district (enacted CD 27)[102] violates both the Fourteenth Amendment and § 2 by depriving the large Latino population in Nueces County of the ability to elect the candidate of their choice and by "cracking" Latinos such that a new Latino opportunity

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to 10."). *See* also Supp. Expert Report of A. Lichtman at 9-11 (D.C. docket no. 152; D.C. Trial Exh. 722) ("The new districts comprising fragments of Travis County are all dominated by Anglo Republicans, in which minorities have no ability to elect candidates of their choice. There is no substitute crossover district in the state-passed plan for the dismembered existing CD 25. Thus, the state-passed proposed plan has the effect of retrogressing minority voter opportunities by reducing minority ability to elect districts from 11 of 32 to 10 of 36.").

[102] Benchmark CD 27 was renumbered as CD 34 in the State's enacted plan. The State then inserted a new Congressional District along the central Gulf Coast and numbered it CD 27.

district cannot be drawn in the South and West Texas area.

Plaintiffs argue that Nueces County has historically been part of the South Texas configuration,[103] and that separating the large Hispanic population from South Texas was part of an intentional scheme to diminish the total Hispanic population available for creating minority opportunity districts in South and West Texas. In this regard, some Plaintiffs showed that 7 compact districts could be drawn that included Hispanic Nueces County voters but not Travis County voters,[104] and thus they argue that the Legislature intentionally excluded Nueces County Hispanics as part of its scheme to unnecessarily destroy the CD 25 "tri-ethnic coalition" district. Other Plaintiffs, such as the Latino Redistricting Task Force, argue that the State could have included the Nueces County Hispanics in the South Texas configuration even with the State's enacted version of CD 35. *See* Plan C190. And yet other Plaintiffs contend that, by including Nueces County within South Texas, it is possible to draw 8 (as opposed to 7) Latino opportunity districts in South/Central/West Texas. *See* Plans C188, C211. Thus, Plaintiffs contend, the State's decision to divest Nueces County from South Texas, which had "ripple effects" not

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[103] The Court notes that from 1968 to 1980, Nueces County was part of a central Gulf Coast district spanning northeast up to and including either Matagorda or Brazoria County. Nueces County first became part of South Texas CD 27 in 1982, where it has remained since that time (though for the 2002 election, the western portion of the county was placed into CD 15).

[104] *See* Plans C123, C163, C164, C201, C208, C214, C218.

only in South/West/Central Texas but also around Harris County, was a violation of § 2 and an act of intentional discrimination against Hispanics.

Although these claims are not without merit, based on the analysis conducted thus far, the Court does not find at this time that Plaintiffs have a likelihood of success on the merits of their claim sufficient to warrant changes to the enacted map for an interim plan.

With regard to the claims that § 2 requires 8 Latino opportunity districts in South/Central/West Texas, the hypothetical plans proposed in support of this assertion fail to satisfy *Gingles* in terms of compactness. In Plans C188 and C211, a proposed district stretches from south Hidalgo County all the way to north Travis County. The Supreme Court has ruled that a nearly identical (and arguably more compact) district in the same location was "noncompact for § 2 purposes." *LULAC*, 548 U.S. at 435. Thus, Plaintiffs do not have a likelihood of success on their § 2 claims premised on the failure to create 8 Latino opportunity districts in South/Central/West Texas.

As noted, several Plaintiffs contend that 7 opportunity districts could have been created that included the Hispanic voters of Nueces County. C235 sufficiently addresses those § 2 claims by restoring CD 23, and thus including 7 Latino opportunity districts in South/Central/West Texas.

Although C235 leaves Nueces County (and thus approximately 200,000 Hispanics who previously were in a Latino opportunity district) in the new Anglo district to the North, the Court finds no basis for altering the enacted map's placement of Nueces County. Even though the Supreme Court has indicated that § 2 rights are

individual rights,[105] the *Shaw* Court noted that "[t]his does not mean that a § 2 plaintiff has the right to be placed in a majority-minority district once a violation of the statute is shown. States retain broad discretion in drawing districts to comply with the mandate of § 2." *Shaw*, 517 U.S. at 917 n.9 (citing *Voinovich v. Quilter*, 507 U.S. 146, 156-157 (1993); *Growe v. Emison*, 507 U.S. 25, 32-37 (1993)). The *Shaw* Court further indicated that, even under a strict scrutiny standard, the Legislature need only "substantially address" the § 2 violation. *Shaw*, 517 U.S. at 918; *see also Bush v. Vera*, 517 U.S. 952, 994 (1996) (O'Connor, J., concurring) ("[I]f a State pursues that compelling interest by creating a district that 'substantially addresses' the potential liability, and does not deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons, its districting plan will be deemed narrowly tailored."). Cf. *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009) ("Much like § 5, § 2 allows States to choose their own method of complying with the Voting Rights Act . . . .").

Although Plaintiffs contend (and demonstrate) that Nueces County Hispanics could have been included in a South Texas district along with other voters suffering a § 2 violation, they have not established a substantial likelihood of success on their claim that the failure to so

---

[105] In *Shaw v. Hunt*, 517 U.S. 899, 917 (1996), the Supreme Court held that § 2 is an individual right as opposed to a right of a minority group as a whole. Thus, in *Shaw* and *LULAC*, it recognized that the State's creation of an opportunity district for those without a§ 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right. *Id.*; *LULAC v. Perry*, 548 U.S. 399, 430 (2006).

place them was a violation of § 2 or the Fourteenth Amendment. The failure to place Nueces County Hispanics in a South Texas district has not diminished Hispanic voter opportunity for § 2 purposes, since whether they are included or not, it appears that only 7 reasonably compact Latino opportunity districts can be drawn in compliance with § 2. In other words, Plaintiffs fail to demonstrate that their placement prevented them (or other Latinos) from constituting a majority in an additional district. *See Voinovich*, 507 U.S. at 154; *see also id.* at 155 ("§ 2 focuses exclusively on the consequences of apportionment"). With the restoration of CD 23, C235 substantially addresses the § 2 violation while respecting the Legislature's policy decisions concerning the placement of Nueces County. Plaintiffs produce no authority to show that every Hispanic voter who was shown to be within a hypothetical or potential *Gingles* district must be placed into an opportunity district.[106]

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[106] *LULAC v. Perry* states that while States retain broad discretion in drawing districts to comply with § 2, "[t]he Court has rejected the premise that a State can always make up for the less-than-equal opportunity of some individuals by providing greater opportunity to others . . ., [and] these conflicting concerns are resolved by allowing the State to use one majority-minority district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be accommodated." 548 U.S. 399, 429 (2006). However, *LULAC* did not involve a situation wherein a State created the required number of minority opportunity districts but failed to include all the voters who demonstrated a § 2 violation within those districts. And, although § 2 may confer individual rights, "plaintiffs can prevail on a dilution claim only if they show that, under the totality of circumstances, the State's apportionment scheme has the effect of diminishing or abridging the

Because C235 creates the required number of § 2 districts and substantially addresses the alleged § 2 violation, Plaintiffs have demonstrated no basis for further changes related to Nueces County.

Nor is the Court able to conclude that Plaintiffs have established a substantial likelihood of success on their claim that the Legislature's decision to exclude Nueces County from a § 2 district was intentionally racially discriminatory. Downton testified that there were "dual goals with 27 and 34" to create a district controlled by Cameron *County* and to create a district for Congressman Farenthold, who lived in Nueces County, to be elected as a Republican. The State elicited testimony that the State House and State Senate representatives from Cameron County (all three Latino Democrats) expressed a desire for a congressional district to be anchored in Cameron County, rather than, as was the case in benchmark CD 27, a district weighted on both ends by the competing ports of Brownsville and Corpus Christi. Further, Gerardo Interiano testified that Nueces County was placed in CD 27 based on a request to be put in a district going north, or at least to be the anchor of a district. Tr. 1461.

In its motion for summary judgment in the § 5 case, Texas argued that CD 27 was overpopulated, and given its location along the Mexico border and the Gulf of Mexico, there were limited options for dealing with the overpopulation.[107] Texas asserted that "Nueces County, in

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voting strength of the protected class," as opposed to individuals within the class. *Voinovich*, 507 U.S. at 157.

[107] D.C. docket no. 41 at 28.

the northern part of [CD 27], was moved into a district to the north, where the Legislature was able to keep the county contained in a single district." Although that placement may have had a disadvantageous effect on Hispanic populations in other areas (such as Travis County and/or the Houston area), and even if the Legislature was aware of such a disadvantageous effect, Plaintiffs have not demonstrated a likelihood of success on their claim that a racially discriminatory purpose lay behind the decision.

H. Remaining § 2 claims

The Court concludes that C235 adequately addresses Plaintiffs' § 2 claims. To the extent Plaintiffs argue that § 2 requires 7 Latino opportunity districts in South/Central/West Texas, C235 creates them in response to the § 5 claims, and thus this Court need not decide whether § 2 requires 7 Latino opportunity districts. To the extent Plaintiffs base their § 2 claims on the creation of coalition districts, the Court finds that significant legal and factual issues remain unresolved that preclude a finding at this time that Plaintiffs are likely to succeed on the merits of these claims.

Conclusion

The Court has independently reviewed C235 and determined that it complies with the Supreme Court's standards set forth in *Perry v. Perez* and that it is an appropriate interim plan. For the reasons we have explained, we have adopted Plan C235.

SIGNED on this 19th day of March, 2012.

/s/
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

/s/
JERRY E. SMITH
UNITED STATES CIRCUIT JUDGE

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

APPENDIX E

In the United States District Court
for the
Western District of Texas

SHANNON PEREZ, ET AL.	§	
	§	
v.	§	SA-11-CV-360
	§	
GREG ABBOTT, ET AL.	§	

ADVISORY

This Court recognizes the effect of the temporary stay entered by the Circuit Justice, but sees nothing in the order that would prohibit the parties from voluntarily exchanging their proposed remedial maps, conferring, and attempting to reach an agreement or understanding on certain aspects of the remedial maps so that in the event the stay is vacated by the Supreme Court this matter may be resumed expeditiously.

SIGNED this 28th day of August, 2017,

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
on behalf of the panel

APPENDIX F

U.S. Constitution Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress,

or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

52 U.S.C. § 10301

§ 10301. Denial or abridgment of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

APPENDIX G

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 8, 2013

The Honorable Joe Straus
Speaker, Texas House of Representatives
Post Office Box 2910
Austin, TX 78768

Dear Speaker Straus:

When the Supreme Court issues its ruling in *Shelby County v. Holder*, the Texas redistricting case will return to the San Antonio court for further legal proceedings. The best way to avoid further intervention from federal judges in the Texas redistricting plans, and ensure an orderly election without further delay or uncertainty, is to enact the interim maps during the regular session. These maps already have the approval from the federal judges overseeing this litigation. Enacting the interim plans into law would confirm the legislature's intent for a redistricting plan that fully comports with the law, and will insulate the State's redistricting plans from further legal challenge.

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Sincerely,

Greg Abbott
Attorney General of Texas

GA:ra

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ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 18, 2013

The Honorable Kel Seliger
Texas Senate
Post Office Box 12068
Austin, Texas 78711

The Honorable Drew Darby
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768

Dear Senator Seliger and Representative Darby:

You recently received a letter from Jose Garza, the Mexican-American Legislative Caucus's redistricting counsel, concerning pending legislative proposals to adopt the 2012 court-ordered interim redistricting plans as the State's permanent redistricting maps. Mr. Garza's letter contains multiple statements and misrepresentations that do not merit a response. But to prevent you from being misled, I will provide you more information about a few of the issues raised by Mr. Garza.

First, Mr. Garza notes that federal judges in Washington, D.C. have ruled that two of the redistricting plans adopted by the Legislature were created "with a discriminatory purpose." Indeed, they did. In fact, the D.C. court concluded that all three maps were tainted by evidence of discriminatory purpose. That is exactly why you should take action. The Legislature has both the opportunity and the obligation to remove that specter of discrimination. That is why I have been counseling leadership that the best way to remedy the violations found by the D.C. court is to adopt the court-drawn interim plans as the State's permanent redistricting maps.

Evidently Mr. Garza believes that the interim maps crafted by three federal judges are burdened by discriminatory purpose or other violations of the Voting Rights Act. The interim maps were not drawn by or voted on by the Texas Legislature. I don't believe — as Mr. Garza does — that the federal judges ordered the 2012 elections to proceed under maps that incorporated racial discrimination. And indeed, the interim maps remedy every legal violation found by the D.C. court.

Mr. Garza faults my proposed resolution to the protracted and contentious redistricting litigation, calling it an "end- run around the judicial process on redistricting." If he is accusing me of attempting to avoid further litigation, I confess.

Far from being an "end-run around the judicial process," my proposed solution recognizes that the Constitution gives to states the prerogative – and primary responsibility – for redistricting. The Supreme Court has repeatedly emphasized that redistricting is first and primarily a legislative function belonging to the states. *See, e.g., LULAC v Perry,* 548 US 399, 414-15 (2006). The Texas Legislature – not a federal court – should have the ultimate word on the State's redistricting maps. You should reject Mr. Garza's solicitation to abdicate Texas' sovereign responsibility. You should not cede to federal courts a responsibility that is first and foremost yours. At this moment, you have control. After the session, you lose control.

Mr. Garza also states that enacting the interim plans would occur "without meaningful input from the minority community." That is wrong. Mr. Garza ignores the fact that the interim maps were drawn with the input and approval of a significant number of the minority groups challenging the State's redistricting maps – even if he himself held out for more. You should also know that Mr. Garza and MALC participated in the interim map-drawing process by submitting their own proposed interim plans – they were rejected by the federal court. Moreover, any legislative approval of the interim plans should – and will – be done through the normal legislative process, which will include full public notice and hearing for the very purpose of gaining "meaningful input" from all Texans, including the minority community.

He also suggests that passing the interim maps will inject additional delay and confusion into the election process. To the contrary, the interim maps have already met with the approval of the federal judges overseeing the redistricting litigation and are the very same maps that Texans voted under during the 2012 election cycle. On the other hand, MALC's proposed interim plans, which if made permanent would significantly alter current legislative districts, have already been rejected by the federal judges who crafted the interim plans. If MALC continues to push for overreaching alterations to the maps the only certainty is prolonged litigation.

Contrary to Mr. Garza's suggestion, the surest way to ensure continuous redistricting litigation and inject further delay is for you to do nothing. If you fail to pass the interim maps, it will likely take several years to resolve the current redistricting litigation (and ensuing appeals), ensuring that Texas' elections will for years to come be mired in confusion or delay or both. As I stated in my March 8 letter to House Speaker Joe Straus, the best way to decrease voter confusion and to end unnecessary litigation would be to enact legislation that makes the 2012 interim plans drawn by the San Antonio district court the State's permanent redistricting maps.

Sincerely,

Greg Abbott
Attorney General of Texas

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APPENDIX H

Testimony of Nina Perales
Vice President of Litigation, MALDEF
House Select Committee on Redistricting
Friday, May 31, 2013
Austin, Texas

Chairman Darby and Members of the House Select Committee, my name is Nina Perales and I am Vice President of Litigation for MALDEF, the Mexican American Legal Defense and Educational Fund. MADEF is a non-profit law firm that protects and promotes the civil rights of Latinos living in the United States.

In the current redistricting cycle, MALDEF represents the Texas Latino Redistricting Task Force, a statewide coalition of non-partisan Latino advocacy organizations that includes the Mexican American Bar Association of Texas, Southwest Voter Registration Education Project, Texas HOPE, the William C. Velasquez Institute, NOMAR and Southwest Worker's Union.

Following the Legislature's enactment of the 2011 redistricting plans for Congress and Texas House, the Texas Latino Redistricting Task Force filed suit challenging the plans as discriminatory against Latinos in violation of the Voting Rights Act and the U.S. Constitution. The Texas Latino Redistricting Task Force also intervened to oppose

preclearance of the 2011 enacted plans in the lawsuit filed by Texas in Washington DC federal court.

In both cases, the Texas Latino Redistricting Task Force presented the bulk of the evidence and argument related to discrimination against Latino voters, including extensive analysis of the maps and expert witness testimony regarding Texas demographics, polarized voting and the history of election practices affecting minority voters.

As a result of these efforts, I am proud to say that the Texas Latino Redistricting Task Force was able to persuade the federal court in San Antonio that its interim plans for the 2012 elections should include substantial changes to alleviate discrimination against Latino voters in the 2011 enacted maps. Our evidence was also strong enough to convince the Texas Attorney General that these changes needed to be made.

The interim maps ordered by the court significantly improve Latino political strength:

Congressional Plan

West Texas: The court's interim plan restored CD 23 to benchmark levels and noted that the restoration addressed the claims that the Voting Rights Act required the creation of 7 Latino opportunity districts in South Texas. WDTX, C235, p. 32. This restoration in the interim maps addresses the intentional discrimination findings by the DDC on CD 23. DDC Op., p. 32-33; DDC Op., p. 108-113.

Dallas Ft.-Worth: The court's interim plan remedies the fracturing of minority voters in DFW that the court found raised claims that the boundaries were the product of intentional racial discrimination. WDTX, C235, p. 36. This change remedies the finding of intentional racial discrimination by the DDC. DDC Op., p. 125.

Existing Minority Congressional Districts: The court's interim plan made changes to ensure that African American and Latino incumbents had their homes and district offices located in the districts that they represent. WDTX, C235, p. 41. The DDC found intentional racial discrimination in the creation of those districts. DDC Op., p. 38-40.

Retrogression Congress: The court's interim plan cures the representation gap by restoring CD 23 and creating CD 33. The DDC concluded that the congressional map should contain 11 minority ability to elect districts to avoid retrogression. The court's interim plan contains 12 minority ability to elect districts.

House Plan

Rio Grande Valley (HD 35): The court's interim plan creates a new Latin-majority district in the Rio Grande Valley to provide representation to the fast-growing population in that region. WDTX Op., H309, p. 5.

Hidalgo County (HD 41): The court's interim plan restored HD 41 after identifying serious concerns related to population deviation under *Larios v. Cox*. WDTX Op., H309, p. 4.

El Paso (HD 78): The court's interim plan restored HD 78 after recognizing the plaintiffs claim of racial gerrymandering of Latinos. WDTX Op., H309, p. 10-11.

Bexar County (HD 117): The court's interim plan restored HD 117 to address claims that the boundaries of the district purposefully discriminated against Latino voters. WDTX Op., H309, p. 6. The DDC also found that the "evidence [regarding HD 117] may support a finding of discriminatory purpose in enacting the State House Plan." DDC Op., p. 71.

Harris County (HD 144): The court's interim plan creates a new Latino-majority district (HD 144) in Harris County after finding that "the plaintiffs have demonstrated a likelihood of success on the merits of their Section 2 claim[.]" WDTX Op., H309, p. 8-9.

Harris County (HD 149): The court's interim plan restored HD 149 which is tri-racial coalition district. WDTX Op., H309, p. 10. The DDC found that "Benchmark HD 149 is a protected ability district, and Texas's decision to dismantle it without offsetting the loss elsewhere is retrogressive." DDC Op., p. 66.

House Retrogression: The court's interim plan restored enough districts to address the DDC finding of retrogression. The DDC found a loss of four ability districts — HDs 33, 35, 117, and 149." The Court's interim plan replaced or restored all four districts. In addition, the court's interim plan revised the boundaries of HD 78 so that it would offer the opportunity to elect the Latino-preferred candidate.

Overall, the court's interim House plan created three more Latino opportunity House districts when compared to the Legislature's 2011 plan.

In conclusion, the Texas Latino Redistricting Task Force did not draw the interim maps, and the maps are not perfect. From a legislative and policy perspective there is room for improvement. There are also additional parties in the lawsuit with different claims and they should have the opportunity to present their perspective on the interim plans.

Most importantly, we do not want to go backwards from the interim maps and see the Legislature subtract from the Latino opportunity that we have gained through our hard-fought efforts in court. Thank you for the opportunity to testify today.

No. 17-586

IN THE

Supreme Court of the United States

GREG ABBOTT, in his official capacity as Governor of Texas, *et al.*,

Appellants,

v.

SHANNON PEREZ, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

The district court found that two congressional districts created by the Texas Legislature in 2011, and subsequently retained by the legislature in 2013, are legally infirm: District 35, as an unconstitutional racial gerrymander; and District 27, as an intentional and effective dilution of Latino voting rights under § 2 of the Voting Rights Act and the Fourteenth Amendment. Texas appealed and obtained a stay before the court-scheduled remedy hearing.

1. Does the Court have jurisdiction under 28 U.S.C. § 1253 to hear the State's appeal prior to entry of injunctive relief?
2. Did the district court commit clear error in carefully considering the substantial factual record of racial predominance in the drawing of District 35, or in concluding no narrowly tailored or compelling justification supported such racial predominance?
3. Did the district court properly find that District 27 violates the Fourteenth Amendment and § 2 of the Voting Rights Act by diluting Latino voting rights?

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MOTION TO DISMISS OR AFFIRM

The core of this case is not what the district court did in 2012 or whether Texas merely followed orders. The 2012 interim ruling on its face was preliminary, and Texas willfully disregarded the court's plain words. At the core of this case, instead, are the district-specific rulings in the appealed order.

Of the thirty-six congressional districts in Texas's Plan C235, the district court invalidated only two: District 27 (with Nueces County at its southern end) and District 35 (with Travis County at its northern end). The court found that District 35 is racially gerrymandered and that District 27 intentionally and in effect dilutes Latino voting rights in violation of the Fourteenth Amendment and § 2 of the Voting Rights Act ("VRA").

The crux of the ruling was that the Texas Legislature had made an illegal trade of the very sort invalidated in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).[1] Racially polarized voting is significant in Nueces County but insignificant in Travis County. Disregarding this crucial difference, the State used race as a tool to gain political advantage and minimize Latino voting strength throughout the region. To protect an incumbent preferred by Anglo voters but not Latinos, Texas traded away the § 2 rights of Nueces County Latinos, stranding them in a new Anglo-dominated District 27. It then used race to create a majority-minority district (District 35) that included 150,000 Travis County

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[1] Jurisdictional Statement Appendix ("App") 112a. "[T]he State's creation of an opportunity district for those without a § 2 right offers no excuse for its failure to provide an opportunity district for those with a § 2 right." App. 181a, quoting 548 U.S. at 430.

Latinos—Latinos without § 2 rights because voting in Travis County is not racially polarized. Despite the absence of this critical *Gingles* factor, the legislature claimed District 35 satisfied its obligation to create a new § 2 district in light of minority population growth. This approach allowed the legislature to achieve a twofer political goal: eliminating the Austin-based crossover district and protecting the Anglo-preferred incumbent in Nueces County. But it required sacrificing the § 2 rights of Nueces County Latinos.

The configurations of Districts 27 and 35 were established in 2011, in Plan C185—and have remained unaltered since. Contrary to the State's position, the district court's 2012 interim plan incorporating the 2011-drawn districts does not immunize them and their origins from judicial review. Districts 27 and 35 are *legislative* creations of the State that have remained constant. When the Texas Legislature embarked on the congressional redistricting task in 2011, it meticulously assigned populations to these districts—census block by census block—in a statute necessitated by the explosive growth of Texas's minority population and the resulting post-census apportionment of four new congressional seats. Exactly half of Texas's thirty-six congressional districts, including Districts 27 and 35, were created in their current form by the 2011 statute. Neither the 2012 interim map nor the 2013 legislative ratification affected them.[2] Far from being "defunct" and "never-employed," J.S. 2, the 2011 congressional redistricting statute has governed

[2] Ten of the thirty-six districts, including District 35, have the same census block assignments in the 2012 interim plan and the 2011 State-enacted plan. Another eight, including District 27, have the same assignment of populated census blocks in 2011 and 2012. Stips. 7-8, June 28, 2017 (ECF No. 1442).

half of the state in every congressional election since its adoption—including the two districts at issue here.

Texas's main argument relies on a mischaracterization of the substantive and procedural origins of the districts under review. The district court's adoption of the interim plan for the 2012 congressional elections was more judicial acquiescence than judicial order. The State itself worked behind the scenes to craft the compromise deal and then helped orchestrate its presentation to the court for adoption—leaving Districts 27 and 35 exactly as created in 2011.

The 2012 interim order was not a get-out-of-jail-free card for the State. The district court forewarned that the plan was not a final adjudication of the merits of the plaintiffs' claims, repeatedly cautioning that the State could not, and should not, treat the interim plan as the definitive word on disputed issues. This ruling was not judicial absolution to the State for legal sins buried in the plan. From the moment the court published Plan C235, Texas knew that unearthing those legal sins awaited a full trial. Two full trials later, Texas's plan has been found wanting in two districts—a result the district court warned was possible specifically with respect to Districts 27 and 35.

While Texas takes umbrage at the district court's examination of the State's discriminatory intent in drawing district lines in 2011, the court's order does not hinge on its intent finding. Rather, Districts 27 and 35 remain invalid regardless of the State's intentional violation of the constitutional and statutory rights of Latino voters—the former as a discriminatory result in violation of § 2 and the latter as a racial gerrymander in violation of the Equal Protection Clause. Texas's failure to confront—let alone dispute—

the district court's detailed factual findings with respect to these infirmities is fatal to its appeal.

The Court's jurisdiction over Texas's appeal at this stage is doubtful. But, if the Court exercises jurisdiction, it should summarily affirm the district court's declaration that Texas has violated the Constitution and the VRA in its configuration of Districts 27 and 35, then remand to the district court in time for implementation of a remedy for the 2018 election cycle.[3]

OPINIONS BELOW

Appellants acknowledge that the district court's Order on Plan C235 "incorporated the district court's prior findings of fact and order on the 2011 map," J.S. 3. Their appendix includes the district court's Order on Plan C185, *Perez v. Abbott*, 2017 WL 1787454 (May 2, 2017), *see* App. C, but omits the 742 Findings of Fact accompanying it. These findings are included in Appellees' Supplemental Appendix ("Supp.App.").

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[3] Texas redistricting rulings followed this pattern in 1996 and 2006. This Court's rulings in the middle of an election year were followed soon after by district court remedial orders issued in time for that year's elections. *See LULAC v. Perry*, 548 U.S. 399 (invalidating districts); *LULAC v. Perry*, 2006 WL 3069542 (E.D. Tex. Aug. 4, 2006) (remedy); *Bush v. Vera*, 517 U.S. 952 (1996) (invalidating districts); *Vera v. Bush*, 933 F. Supp. 1341 (S.D. Tex. 1996) (remedy).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Omitted from the jurisdictional statement are texts, linked below,[4] of two "statutes . . . involved in the case" under Supreme Court Rule 14.1(f): Texas's 2011 and 2013 congressional redistricting statutes. *See* Act of June 20, 2011, 82nd Leg., 1st C.S. ch. 1, 2011 Tex. Gen. Laws 5091-5180, *and* Act of June 21, 2013, 83rd Leg., 1st C.S., ch. 3, 2013 Tex. Gen. Laws 5005-5006.

STATEMENT OF THE CASE

A. An essential precondition for a viable claim under § 2 of the VRA is a pattern of racial bloc voting. *See generally Thornburg v. Gingles*, 478 U.S. 30 (1986). It is undisputed that as a general rule voting in Texas is "strongly racially polarized." App. 151a, 273a. But racial bloc voting patterns are not uniform. They differ from county to county. This is especially evident for the two districts (27 and 35) and counties (Nueces and Travis) at the center of the State's appeal. In Nueces County, voting is racially polarized, significantly so. *Id.* 111a-112a, 183a-184a. Not so in Travis County, the one place in Texas where legally significant racially polarized voting is *not* present. Supp.App. 308a, 340a, 470a (FF374, 424, 694); App. 110a, 175a, 181a. Anglos vote cohesively in every county in the state except Travis. Supp.App. 475a (FF707).

B. The 2010 census reported that Texas's population had increased by 4.2 million over the past decade. Supp.App. 457a (FF666). Minorities accounted for

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[4] 2011: http://www.capitol.state.tx.us/tlodocs/821/billtext/pdf/SB00004F.pdf#navpanes=0.

2013: http://www.capitol.state.tx.us/tlodocs/831/billtext/pdf/SB00004F.pdf#navpanes=0.

nearly 90% of the growth, 65% of it Latino. *Id.* Citizen voting age population ("CVAP") also grew significantly, while the Anglo CVAP share declined. *Id.* 459a-460a (FF671-672). Because of the growth, Texas gained four new congressional seats, increasing its delegation to 36 seats. *Id.* 34a (FF62).

C. In 2011, race was at the center of the Texas Legislature's redistricting work. The Republican-controlled legislature equated minority opportunity districts under § 2 with Democratic districts, Supp.App. 438a (FF623), was "hostile to the creation of any minority districts," and was willing to provide minority opportunities "only if they felt it was required by the VRA," *id.* 476a (FF710). The increase in districts was due to minority population growth, but the legislature decided to draw three new Anglo-controlled districts and only one new minority opportunity district. App. 326a; Supp.App. 439a (FF624).

The legislative process itself was contentious. Minority lawmakers were excluded from the redistricting process. Supp.App. 193a (FF187(B)). Their substantive amendments were tabled, while even the most minor changes requested for Anglo congressional incumbents were adopted. *Id.* 195a-197a (FF187(C)-(E)). "[N]umerous proposals . . . included a minority district in [Dallas-Fort Worth (DFW)]," but were rejected because mapdrawers considered it a "Democrat district." *Id.* 286a (FF330).

D. The statewide congressional map drawn in 2011 evidenced across-the-board efforts to minimize minority voting strength. In West Texas, mapdrawers focused yet again on micro-designing District 23, invalidated in *LULAC v. Perry*, to undermine the ability of Latino voters to elect their candidates of choice. App. 144a-146a (discussing use of "nudge

factor"). In the DFW region, the minority population was manipulated to "decrease current and future minority voting strength," and district lines "pulled strangely-shaped minority population areas out of certain districts in order to submerge them in larger Anglo populations and to reduce minority voting strength." *Id.* 400a. Mapdrawers drew these contorted districts using racial data. *Id.* 286a.

While the mapdrawers understood that the VRA compelled them to raise the number of Latino-opportunity districts from six to seven by *adding* one in the South and West Texas envelope,[5] *id.* 127a; Supp.App. 229a (FF225), they were unwilling to risk the incumbencies of two non-Latino preferred candidates, Canseco and Farenthold, App. 148a, 191a, who had unexpectedly won the 2010 election in Latino-opportunity districts in the envelope. Supp.App. 25a-26a (FF51, 52), 291a (FF341), 344a (FF435). Canseco and Farenthold were not expected to win again in their districts, which, if unaltered, would remain Latino-opportunity districts. App. 144a; Supp.App. 299a (FF356). So the mapdrawers devised a strategy to protect the new Anglo-preferred incumbents in existing Districts 23 and 27 while simultaneously adding a new Latino-opportunity district. App. 112a.

In District 23, the mapdrawers painstakingly identified precincts with high Latino presence and low Latino turnout, and then artfully manipulated district lines to increase HCVAP percentage while

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[5] The "envelope" is "the large triangular area contained by a line starting in Nueces County, running south to Cameron County, then along the Rio Grande River to El Paso County, then from El Paso County to Bexar County, then northeast to the Hays/Travis County line, and back to Nueces County." Supp.App. 294a (FF354).

excluding high turnout Latino precincts from the district. App. 106a, 145a; Supp.App. 391a (FF518). They then classified it as a Latino-opportunity district, even though it was specifically drawn to ensure that the Latino-preferred candidate would *not* win. App. 146a ("facade" of an opportunity district).

In District 27, such machinations would be insufficient to protect the Anglo-preferred incumbent. To be re-elected, he had to be switched to a district of clear Anglo dominance. Since this would eliminate a Latino-opportunity district rather than add one, the mapdrawers decided they needed to make a trade.

First, they "almost completely reconfigured" District 27 from its historic southern orientation to a northwestern one. Supp.App. 293a (FF345). This converted District 27 into an Anglo-dominated district that left the more than 200,000 Nueces County Latinos stranded without an effective voice in congressional elections. App. 110a; Supp.App. 155a-156a, 294a (FF169, 347). Next, after adding a compensatory South Texas district (new District 34, south of Nueces) to keep from losing a Latino-opportunity district in the envelope, Supp.App. 156a (FF169), the mapdrawers had to look elsewhere in the envelope to add a district so they could claim compliance with the VRA. App. 114a.

Their solution was to turn to Travis County and eliminate the existing crossover district anchored there (benchmark District 25) in which minority voters, with the help of crossover Anglo voters, were electing their congressional candidate of choice. Supp.App. 340a (FF 425). To do this, the mapdrawers split "the African American community in East Austin . . . 'to create a conduit to pick up the rest of the Hispanic population in the northwest part of 35.'" App. 168a. They then created a new Latino-opportunity district,

District 35, by roping in sizeable pockets of Latinos in Travis County—where voting is *not* polarized—and linking them along a long, narrow strip of interstate highway with other pockets of heavily Latino population on the south side of Bexar County. *Id.* 171a-174a & n.39 ("they used race as their tool"). They fractured historic minority communities in Travis County despite proposed alternatives that would have added a new Latino-opportunity district without significant divisions of Travis County. Supp.App. 329a-331a (FF406-410).

E. With § 5 of the VRA still operative and Texas a covered jurisdiction, Texas had to obtain preclearance of Plan C185. In July 2011, it filed a preclearance suit in the District of Columbia. Supp.App. 229a (FF225). Plan C185 was simultaneously under challenge in San Antonio—the court below—for infirmities alleged under the Fourteenth Amendment and § 2 of the VRA. *Id.* 148a (FF153).

These challenges were tried in September 2011, but as the 2012 election cycle opened with no preclearance ruling, the San Antonio court was forced to develop an interim plan. In November 2011, the court ordered an interim plan for the 2012 congressional elections. Texas appealed, and this Court invalidated the plan in *Perry v. Perez*, 565 U.S. 388 (2012), announcing a new standard to govern imposition of an interim plan while preclearance is pending. After *Perry*, in evaluating challenges under the Constitution and § 2, the district court had to adhere to state policies embodied in a redistricting plan "except to the extent those legal challenges are shown to have a likelihood of success on the merits," the standard applicable to preliminary injunctions, *id.* at 394, or, with respect to § 5, except to the extent there was a "not insubstantial" chance

aspects of the plan would fail to gain preclearance. *Id.* at 394-95. This Court remanded for the district court to apply this new standard.

F. The Court recognized the "exigencies caused by the impending election," *Perry*, 565 U.S. at 398, and by the time of remand, Texas was already well into its 2012 election cycle. Circumstances compelled the district court to act quickly to apply the *Perry* standards and get a new election schedule *and* interim congressional plan in place. The court pressed the parties to quickly work out a compromise on a new interim map so elections could get underway. A subset of plaintiffs negotiated a compromise with the State on an interim map, and it was presented to the district court less than a month after the *Perry* remand. App. 6a.[6] The compromise's principal changes were creation of a new district in the DFW area and an increase in District 23's HCVAP. The compromise repaired only such obvious, low-hanging fruit in the deeply flawed plan as the District 26 "'lightning bolt' extending into CD 12. *Id.* 400a.

No changes were made to Districts 27 and 35, even though they were part and parcel of the 2011 map's minimization of minority voting strength.

The State itself acknowledged the map's imperfections and limited purpose—admitting the plan is "far from perfect"—but supported it anyway as "adequate for [its] intended purpose" of allowing the 2012 elections to move forward. State Advisory at 4. It

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[6] Besides the State, the main proponents of the compromise plan were the Texas Latino Redistricting Task Force plaintiff group and Congressman Cuellar. Defendants' Advisory Regarding Interim Redistricting Plans, Feb. 6, 2012 (ECF No. 605) ["State Advisory"] at 3.

argued that "Texas voters are better served, *in the short term*, by a reasonable resolution that allows elections to go forward." *Id.* at 20 (emphasis added).

Barely a month after *Perry*'s remand, over objections from most plaintiffs, the court "accept[ed] the compromise plan," modified it for purely technical reasons, and issued Plan C235 as the interim plan for the 2012 elections. App. 368a. Districts 27 and 35 still were exactly the same as the State drew them in 2011. *Id.* 113a.

The district court expressly warned the parties that the "compromise plan" was by no means a definitive resolution of the issues, telling them that Plan C235 was only interim, "not a final ruling on the merits of any claims," and reflects only "preliminary determinations" that "may be revised upon full analysis." *Id.* 367a-368a. In allowing District 35 to remain unchanged "at this time," *id.* 415a, the court reiterated that whether it was a racial gerrymander was a "close call," *id.* 409a. The court was equally wary of its preliminary ruling on District 27, noting that the § 2 challenges were "not without merit" and that its ruling allowing District 27's interim use was only effective "at this time." *Id.* 419a. In short, Texas was on notice that the "preliminary" conclusions about Plan C235 were not the court's final word on Appellees' constitutional and § 2 claims, particularly with respect to Districts 27 and 35. *Id.* 6a (quoting 2012 interim order).

G. On August 28, 2012, the D.C. court issued final judgment on preclearance of Plan C185, unanimously concluding that "the plan was enacted with a discriminatory purpose." *Texas v. United States*, 887 F. Supp. 2d 133, 159 (D.D.C. 2012), *vacated on other grounds*, 133 S. Ct. 2885 (2013). Pointedly, the court explained that "[t]he parties have provided more evidence of

discriminatory intent than we have space, or need, to address here," *id.* at 161 n.32, and that it was "persuaded by the totality of the evidence that the plan was enacted with discriminatory intent," *id.* at 161.[7] The court further determined that Texas had violated § 5 by dismantling benchmark District 25, which, anchored in Travis County, was home to a "tri-ethnic crossover coalition" where minority voters had an opportunity to elect their congressional candidate of choice. *Id.* at 184, 190. Texas appealed.

H. With the preclearance appeal pending, the Governor called a special legislative session for the express purpose of repealing Plan C185 and adopting Plan C235. Supp.App. 231a (FF231); App. 40a. As the district court found, however, "[t]he Legislature did not adopt the Court's plans with the intent to adopt legally compliant plans free from discriminatory taint, but as part of a litigation strategy." *Id.* That litigation strategy was predicated on attempting to avoid the same findings of discriminatory intent and VRA liability in the San Antonio court that had already been made by the D.C. court, and to claim a cloak of protection from the district court's preliminary approval of the interim plan to insulate the State from further liability. *Id.* 44a (State "attempting to prevent . . . relief for purposeful racial discrimination").

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[7] Such evidence included emails between mapdrawers identifying ways to create the appearance of a Latino-opportunity district without having it actually perform that way, the troubling removal of economic engines and district offices from districts represented by African-American congresspersons, and the deliberate evisceration of performing crossover District 25. *Id.* at 155-56, 160-61, 183-84.

The legislature's own attorney publicly echoed the district court's earlier warnings and advised that the legislature could not rely upon the district court's 2012 interim plan order as proof the plan complied with the VRA and Constitution. The district court, he said, had been "in a little bit [of a] tricky [position] because [it] had not made full determinations, . . . had not made fact findings on every issue, had not thoroughly analyzed all the evidence but they had to make some best case guesses . . . ." App. 43a. "[W]illfully ignor[ing] those who pointed out deficiencies," *id.* 45a n.46, including its own attorney, the legislature ratified Plan C235 on June 24, 2013.

I. The district court subsequently conducted two week-long trials, on Plan C185 in 2014, then on Plan C235 in 2017. In both, the issues as to Districts 27 and 35 were the same, because the "exact same configuration of CD35 and CD27 remains in Plan C235" as in Plan C185. App. 113a. The district court's March 2017 ruling on Plan C185 established that intentional discrimination infected the 2011 redistricting plan, describing the intentional fracturing of communities of color and race-based line drawing across the state. *See, e.g., id.* 289a (in the DFW area "race was used as a proxy for political affiliation, and that this was done intentionally to dilute minority strength").

The court's August 2017 ruling on Plan C235 effectively upheld the interim map's compromise changes to District 23 and the DFW-area districts, rejecting further § 2 challenges there. But the court found differently for Districts 27 and 35, recognizing that they were integral elements of the overall discriminatory strategy employed in the 2011 plan that the district court had not had time to identify

upon preliminary review. In the appealed ruling, the district court sustained the challenges lodged since the case's beginning in 2011, summarizing the linkage of the two districts:

> Including all or most of the population of Nueces County in a southern district and in "the envelope" increases the Hispanic population available in the envelope to draw Latino opportunity districts, and makes it easier to draw HCVAP-majority districts CD20, CD23, and CD35. Including the population of Nueces County in the envelope makes it easier to draw seven Latino opportunity districts under § 2 without including Travis County.

Supp.App. 300a (FF359). In finding that the legislature's "offset" Latino-opportunity district, District 35, was an unconstitutional racial gerrymander, the court found that District 35's location "was not to address § 2 concerns, but to intentionally destroy an existing district [benchmark District 25] with significant minority population." App. 110a.

The court struck down District 35 as a racial gerrymander in both plans. *See* App. 115a ("Although Plan C235 was enacted in 2013, the decision as to which voters to include within CD35 was made in 2011, and that remains the proper time for evaluating the district."). The court found that the core black community in Austin was divided from historical communities of interest and "effectively neutered" by grouping it with a distant metropolitan area with which it did not share interests. Supp.App. 335a (FF414). It concluded that "race subordinated other redistricting principles" in Travis County, *id.* 339a, 342a (FF421, 428), where minority populations were

"fractured" and Latino voters carved out for inclusion in a new majority-minority district without any VRA justification because Anglo bloc voting in opposition to minority voter preferences is absent, *id.* 334a, 340a (FF413, 424).

As to District 27, the court found that it had been converted from a Latino-opportunity district into one where "Latino voters have no opportunity to elect their preferred candidates." App. 190a. The effect was to dilute the voting strength of the more than 200,000 Nueces County Latinos stranded in the district. *Id.* 191a. And the choice was purposeful, made "to protect an incumbent who was not the candidate of choice of those Latino voters." *Id.* After the Plan C235 trial, the court found that this discriminatory intent "carr[ied] over" to the 2013 adoption of identical district lines, "purposefully . . . depriv[ing] plaintiffs of any remedy." *Id.* 46a, 116a.

ARGUMENT

I. THE COURT DOES NOT HAVE JURISDICTION OVER THE STATE'S APPEAL UNDER 28 U.S.C. § 1253.

This Court has no jurisdiction to entertain Texas's premature appeal because the district court has not ordered injunctive relief. Under 28 U.S.C. § 1253, appeals to this Court from three-judge district courts may only occur "from an order granting or denying . . . an interlocutory or permanent injunction." There has been no such injunction here, as made clear in both the order on appeal, *see* App. 119a, and the court's subsequent order denying Texas's motion for stay pending appeal, *see* Text Order, Aug. 18, 2017) (ECF No. 1538).

"This Court has more than once stated that its jurisdiction under the Three-Judge Court Act is to be

narrowly construed since any loose construction of the requirements of (the Act) would defeat the purposes of Congress to keep within narrow confines our appellate docket." *Goldstein v. Cox*, 396 U.S. 471, 478 (1970) (citation and internal quotation marks omitted); *see also Bd. of Regents of the Univ. of Texas Sys. v. New Left Educ. Project*, 404 U.S. 541, 545 (1972) (reiterating that § 1253 "is to be strictly construed"). "That canon of construction must be applied with redoubled vigor when," as here, "the action sought to be reviewed . . . is an interlocutory order of a trial court. In the absence of clear and explicit authorization from Congress, piece-meal appellate review is not favored." *Goldstein*, 396 U.S. at 478.

Indeed, this Court has specifically held that it lacks jurisdiction where three-judge courts acknowledge a party's eventual entitlement to injunctive relief but delay its entry. *See Gunn v. University Committee to End the War in Viet Nam*, 399 U.S. 383, 390 (1970) ("Because the District Court has issued neither an injunction, nor an order granting or denying one, . . . we have no power under § 1253 either to remand to the court below or deal with the merits of this case in any way at all.") (internal quotation marks omitted).

Here, the district court declared that Texas's congressional plan violates § 2 of the VRA and the Constitution, and indicated that those violations must be remedied, while declining to enter an injunction. App. 118a. As in *Gunn*, this Court has no power to "deal with the merits of this case in any way at all" until the district court enters an injunction. 399 U.S. at 390. Recognizing a right to relief and granting relief fall on opposite sides of § 1253's jurisdictional divide.

Texas's Jurisdictional Statement does not cite, much less discuss, a single § 1253 opinion. Instead,

Texas seeks refuge in a different provision—28 U.S.C. § 1292(a)(1)—which governs appeals from grants or denials of injunctive relief to circuit courts. Texas's only jurisdictional argument is that § 1253 should be given the same interpretive gloss for finding the *grant* of an injunction that *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), gave § 1292(a)(1) for finding the *denial* of an injunction. Texas's § 1292(a)(1)-based argument fails on several fronts.

First, § 1292(a)(1) by its own terms does not apply to instances where "direct review may be had in the Supreme Court." The strict construction rule applicable to the Court's jurisdiction under § 1253 has never applied to orders appealed to circuit courts under § 1292(a)(1). While circuit courts' sole function is to entertain direct appeals, Congress intended that the Supreme Court's appellate docket must be "narrow[ly] confine[d]" because of the Court's other, primary duties. *Goldstein*, 396 U.S. at 478. It makes little sense, therefore, to extend *Carson*'s framework to § 1253.

Second, even if *Carson* did apply to appeals pursuant to § 1253, its requirements are not satisfied. Texas contends that the order below has the "practical effect" of "preventing the State from conducting congressional elections under its duly enacted redistricting plan" because it noted that the violations "must be remedied," ordered Texas's counsel to provide notice of whether the legislature will be called into session to cure the violations (and, if so, when), and set a hearing to consider remedial maps if the State declined the legislative remedy option. J.S. 12-13. But setting a hearing to determine when and how to remedy violations falls squarely within the district court's "inherent authority to manage [its] dockets and

courtrooms with a view toward the efficient and expedient resolution of cases." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016). Even a request for submission of proposed remedial plans is not an appealable injunction under § 1292(a)(1). *See* 16 Wright & Miller, Federal Practice and Procedure § 3922.2 (3d ed. 2012) ("orders that the parties prepare plans for injunctive relief" ordinarily not appealable under § 1292(a)(1)).[8]

Texas's suggestion, moreover, that a remedial hearing is equivalent to an injunction ignores all-important details about the nature, scope, and timing of the remedy. Indeed, the question of *when* a remedy should take effect is a point of recurring contention in the remedy phase of election cases. *See, e.g.*, *North Carolina v. Covington*, 137 S. Ct. 1624 (2017); *Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006). Remedy proceedings precede remedy orders precisely to consider these critical issues. As things stood after the August order (and as they stand now after this Court's stay), the "practical effect" of the liability ruling is unknown and unknowable.

Texas's argument that the additional two *Carson* requirements are satisfied likewise fails. The order has "serious, perhaps irreparable, consequences," Texas says, "because it invalidates two congressional districts and compels the State to redraw the congressional map." J.S. 14. The first point is nothing more than a claim that § 1253 gives the Court jurisdiction over appeals from liability rulings—a claim this Court has

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[8] These principles undoubtedly are the basis for the Court's reiteration of the limits of appellate jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1) in the voting rights context: "We have long held that an order resolving liability without addressing a plaintiff's request for relief is not final." *Riley v. Kennedy*, 553 U.S. 406, 409 (2008).

expressly rejected. The second point simply reflects the truism that constitutional and statutory violations require a remedy. That fact on its own—absent an actual remedy—hardly satisfies *Carson*'s standard for § 1292(a)(1) jurisdiction.

Exercising jurisdiction over the State's appeal cannot be squared with the historical understanding of § 1253's limits. The Court should dismiss the appeal as promptly as reasonably possible and allow the district court to proceed to the remedial phase.

II. THE DISTRICT COURT'S PRELIMINARY RULING DOES NOT CLOAK THE STATE WITH LEGAL IMMUNITY FOR 2011 ACTIONS REPEATED IN ITS 2013 LEGISLATION.

The district court's invalidation of Districts 27 and 35 in Plan C235 was based on extensive factual findings regarding those same districts in Plan C185. App. 14a n.13. Rather than dispute those findings, Texas sidesteps them entirely, relying on a carefully-staged disappearing act. It argues that what the legislature actually did—and intended to do—when it drew those districts in 2011 is of no consequence because of subsequent events in 2013. J.S. 15-25. But the only action the legislature took in 2013 with respect to Districts 27 and 35 was to reaffirm and ratify the illegal lines it drew two years earlier.

Texas's defense is unprecedented, boiling down to this putative rule: a legislature that successfully masks its discriminatory motives during preliminary injunction proceedings can forever preclude the court from finding liability by simply repealing and

reenacting its law—shifting the responsibility for its creation from the legislature to the court.

Ample authority shows the opposite to be true. The Court only recently explained the characteristics of preliminary rulings in terms contradicting Texas's argument:

> Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents. *The purpose of such interim equitable relief is not to conclusively determine the rights of the parties*, but to balance the equities as the litigation moves forward.

Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (emphasis added) (citations omitted). This echoes decades of precedent establishing that a preliminary injunction ruling has limited significance for the ultimate disposition of a claim.

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.

Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (citations omitted); *see also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 317 (1985) ("any conclusions reached at the preliminary injunction stage are subject to revision"). Texas's gambit of claiming safe harbor in the district court's preliminary ruling "improperly equates 'likelihood of success' with 'success,' and . . . more important . . . ignores the significant procedural differences between preliminary and permanent injunctions." *Camenisch*, 451 U.S. at 394.

Texas can hardly feign surprise that preliminary court rulings cannot be used to estop constitutional claims. Not only did the legislature's own lawyer caution against this shell-game strategy for hiding the State's unconstitutional conduct in 2013,[9] but also the district court expressly told Texas that its interim ruling was "not a final ruling on the merits of any claims asserted by the Plaintiffs in this case." App. 367a. Texas's boast that it simply "took the district court at its word," J.S. 11, is an empty one. The district court's "word" to Texas was that the interim plan ruling contained only "preliminary determinations" for one election cycle that "may be revised upon full analysis." App. 367a-368a. The State paid no heed.

Hunter v. Underwood, 471 U.S. 222 (1985), further undercuts the State's effort to make the 2011 creation of Districts 27 and 35 disappear behind the 2013 legislative curtain. In *Hunter*, plaintiffs challenged

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[9] Texas makes the unsupported assertion that the 2013 legislature continued to use some Plan C185 districts "only because" of the district court's preliminary 2012 ruling that they likely were not illegal. J.S. 18. The district court made no such finding. Rather, it found that the 2013 ratification was a litigation strategy, not deference to the court. App. 40a.

a 1901 Alabama constitutional provision as racially discriminatory. Alabama argued that the amendment's original invidiousness had been diluted over subsequent decades to the point that it was no longer intentionally discriminatory. *Id.* at 232-33. The Court unequivocally rejected that argument and struck down the law on equal protection grounds, explaining that the provision's "original enactment was motivated by a desire to discriminate against blacks on account of race and . . . continues to this day to have that effect." *Id.*

This case is indistinguishable. At the beginning of the decade, Texas enacted a redistricting plan riddled with discriminatory intent. While judicial intervention mitigated *some* of the discriminatory effect flowing from that improper intent, acquiescing to that limited and preliminary judicial intervention by enacting Plan C235 does not erase the intent with which Districts 27 and 35 were enacted or do anything to correct how that intent continued to produce the same effect in those districts in 2013 and beyond.

Technical canons of statutory construction buttress *Hunter*'s application. Districts 27 and 35 are, after all, *statutory* provisions, originally included as Sections 27 and 35 in Article II of the State's 2011 congressional redistricting bill. *Supra* n.4. Plan C235's ratification in 2013 effectively re-adopted these original sections of the 2011 legislation, embedding them in the 2013 statute. "Where there is . . . a repeal and a re-enactment of a portion of [an existing statute], the re-enactment neutralizes the repeal so far as the old law continued in force. It operates without interruption where the re-enactment takes effect at the same time." 1 J.G. Sutherland, Statutes and Statutory

Construction § 238 (2d ed. 1908) (cited with approval, *Hassett v. Welch*, 303 U.S. 303, 314 & n.17 (1938)).

Texas's insinuation that the 2011 configurations of Districts 27 and 35 "no longer existed" once they became part of Plan C235, J.S. 27, is transparently wrong. They have been used in Texas elections continuously since their adoption in 2011. A challenged statute does not become moot just because it is voluntarily repealed (and reenacted, unchanged) in the middle of a lawsuit. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 n.10 (1982). Here, the legislature not only left open the possibility that it *might* re-enact the 2011 redistricting statute, it effectively *did* re-enact that statute with respect to Districts 27 and 35.

In short, the Court should not sanction Texas's gaming of the judicial process. When the legislature decided to re-enact Districts 27 and 35 in 2013, aware that they had only been approved under a preliminary injunction standard, it assumed the risk that the districts might not withstand full scrutiny.

III. THE DISTRICT COURT'S FINDING OF INTENTIONAL DISCRIMINATION IS NOT ERRONEOUS.

Unable to hide behind its 2013 ratification of identical district lines, Texas's argument against the district court's finding of intentional vote dilution in District 27 all but evaporates.

Nueces County has 206,000 Latinos, 133,370 of them eligible to vote. Supp.App. 294a (FF347). Voting there is highly racially polarized. *Id.* 300a (FF358). The district court found that Texas intentionally diluted the voting rights of Nueces County Latinos when it stranded all of them in reconfigured District 27 for the specific purpose of ensuring that they would

be in an Anglo-dominated district where they would "have no opportunity to elect their preferred candidates." App. 190a. The court meticulously worked through the extensive trial evidence, Supp.App. 287a-300a (FF335-359), to determine that the legislative flip of District 27 from Latino-opportunity to Anglo-dominated meant that the more than 200,000 Latinos in Nueces County "who had been in an opportunity district were no longer in such a district." *Id.* 299a-300a (FF357). The court found that this was by legislative design and happened not because the legislature wanted these Latino voters to have influence in District 27 or because their rights could not be accommodated without sacrificing other voters' § 2 rights, but because they would not vote for the newly elected Anglo Republican incumbent. App. 111a. This, the court found, "intentionally deprived [Nueces County Latino voters] of their opportunity to elect a candidate of their choice." *Id.* 116a. The 2013 ratification continued the violation, "purposefully intending to deprive plaintiffs" of their § 2 rights. *Id.* In short, by leaving District 27 intact in 2013, the legislature ratified its previous purposeful vote dilution on racial grounds.

The district court's findings of intentional racial discrimination in District 27 must be accepted unless clearly erroneous. *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982). All Texas offers is the assertion that the district court reached its finding of purposeful discrimination by doing nothing more than "infer[]" intent from the "mere fact" that the legislature knew it was moving District 27 out of the opportunity district column. J.S. 30. But the court did much more than that. It marched through the facts, demonstrating that the deliberate choice from the beginning was

to isolate Nueces County Latinos in a congressional district where they had no meaningful electoral say—all the while seeking cover in the intentional racial carve-up of Travis County to help create District 35.[10]

Texas's argument provides nothing to show how this conclusion was erroneous, much less clearly so. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) ("A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern.") (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)). This longstanding rule of deference is surely applicable here, where the district court's ultimate conclusion of discriminatory intent came after it heard weeks of testimony and made credibility determinations of multiple decisionmakers central to the design of the challenged districts. *See id.* at 1478 ("A choice to believe 'one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence,' can 'virtually never be clear error.'") (quoting *Anderson*,

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[10] The court found that District 35's location "was not to address § 2 concerns, but to intentionally destroy an existing district with significant minority population." App. 110a. The dismantled crossover district, benchmark District 25, was created by the district court in 2006 on remand from *LULAC v. Perry*. Supp.App. 426a, 428a (FF 583, 593). Plaintiffs challenged the destruction of benchmark District 25 based on the plurality opinion in *Bartlett v. Strickland*, 556 U.S. 1 (2009), which warned that redistricting lines purposefully drawn to "destroy otherwise effective crossover districts" would raise serious Fourteenth Amendment concerns. *Id.* at 24. Because it found that District 35 is a racial gerrymander, the court did not reach the *Bartlett* intentional vote dilution claim. App. 110a-111a n.83. But the intentional destruction of this crossover district was intertwined with the District 35 racial gerrymander. *Id.* 172a n.38 (State used District 35 to "justify its destruction" of benchmark District 25).

470 U.S. at 575). The finding of intentional vote dilution as to District 27 should stand.

IV. REGARDLESS OF DISCRIMINATORY INTENT, DISTRICTS 27 AND 35 ARE UNLAWFUL.

While Texas challenges the notion that its 2011 intent in drawing Districts 27 and 35 bears on its 2013 reenactment of those identical districts, it admits that "discriminatory *effect* may be carried over (whether intentionally or unwittingly) from one version of a law to another." J.S. 17. This concession is damning given the district court's express finding that the "the racially discriminatory intent *and effects* that it previously found in the 2011 plan[] carry over into the 2013 plan[] where those district lines remain unchanged." App. 117a (emphasis added). Even were the State's discriminatory intent filtered out by the adoption of a different bill number effectuating identical district lines, Districts 35 and 27 are still invalid based on the district court's detailed findings with respect to their ongoing discriminatory effects.

In the Plan C185 order, the district court determined that "Defendants' decision to place Nueces County Hispanic voters in an Anglo district [District 27] *had the effect* and was intended to dilute their opportunity to elect their candidate of choice" in violation of § 2 of the VRA. App. 194a (emphasis added). It further found that District 35 is a racial gerrymander in violation of the Equal Protection Clause, as "Defendants' decision to place majority-HCVAP CD35 in Travis County" was effectuated through race-based means and not justified by a compelling state interest. *Id.* As a result, "[t]he configurations of . . . CD27[] and CD35 in Plan C185 are . . . invalid." *Id.* 195a. Regardless of Texas's

discriminatory intent in drawing these districts in 2011 or its continued embrace of them in 2013, those "exact same configuration[s]" remain in place, *id.* 113a—and remain invalid—in Plan C235.

A. District 35 Remains a Racial Gerrymander.

The district court found that race predominated over traditional districting principles in "the drawing of district lines and selection of district population" in District 35 under Plan C185. App. 166a; Supp.App. 328a-329a (FF405). Those "district lines" remain unchanged in Plan C235, and the same "district population" suffers from the State's unjustified race-based classification. App. 164a n.31 ("The harm flows from being 'personally . . . subjected to [a] racial classification,' not from vote dilution or intentional discrimination.") (quoting *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015)). The district court's assessment of District 35 is owed "significant deference." *Cooper*, 137 S. Ct. at 1464.

The district court's racial gerrymandering finding, moreover, did not hinge on the State's discriminatory intent. The district court correctly noted that "[d]iscriminatory purpose is not an element of a *Shaw* type claim." App. 37a n.36 (referring to *Shaw v. Reno*, 509 U.S. 630 (1993)). *See Covington v. North Carolina*, 316 F.R.D. 117, 124 n.1 (M.D.N.C. 2016) ("In reaching this conclusion [that race predominated], we make no finding that the General Assembly acted in bad faith or with discriminatory intent in drawing the challenged districts."), *aff'd* 137 S. Ct. 2211 (2017). That analysis comports with this Court's articulation of the racial predominance standard as one which examines the use of race in the placement of voters in various districts. *Alabama*, 135 S. Ct. at 1271 ("[T]he

'predominance' question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominantly uses race as opposed to other, 'traditional' factors when doing so."); *see also Miller v. Johnson*, 515 U.S. 900, 916 (1995). It is the race-based placement of voters without a strong basis in evidence for doing so, rather than any intent to discriminate through vote dilution, that defines a *Shaw* claim.

The district court's conclusion that race predominated in the drawing of District 35 rests on undisputed evidence about the ways mapdrawers *effectuated* their intent to destroy an existing crossover district by creating a majority-Latino district snaking its way through Travis County to capture Latino voters. For instance, the district court highlighted several egregious precinct splits, "including the Precinct 433 split to divide St. Edward's University to place the dorms (with large Hispanic student population) into CD35, while placing the administration building in CD21, and the Precinct 440 split to include an arrowhead shape containing the Riverside apartments (a more Hispanic population) within CD35." App. 167a. Because only racial data, not political data, is available below the precinct level, Supp.App. 486a (FF732), this evidence establishes that race predominated over politics in drawing District 35. *See Bush v. Vera*, 517 U.S. 952, 970-71 (1996) (highlighting "split[] voter tabulation districts" in light of the fact that "the districting software used by the State provided only racial data at the block-by-block level" as "objective evidence" of racial predominance). The district court further found that the "squiggle" at the northern part of District 35 grabbed population that is 90-100% Latino. App. 167a. Indeed, "[t]he CD35 district lines in Travis County do not match up with any

city boundaries, with House districts, or with any recognizable communities of interest other than race." *Id.* 168a. The southern portion of the district, moreover, consistently includes "areas with high percentages of Hispanic residents and voters and exclude[s] less Hispanic areas." *Id.* 168a. The end result of this race-based carving of voters from north central Austin to south San Antonio is a district that remains the least compact congressional district in the state. *Id.* 110a n.83, 162a.[11]

These are objective, undisputed facts about the placement of "a significant number of voters within or without" District 35 under Plan C185, *Miller*, 515 U.S. at 916, and the same placement of voters within and without District 35 under Plan C235. Texas does not even attempt an argument that race did not predominate in the drawing of District 35 or that the district court's factual findings are clear error.

When, as here, race predominates, the burden shifts to the State to demonstrate that the district's configuration was narrowly tailored to a compelling government interest. *Cooper*, 137 S. Ct. at 1464. Texas falls well short of its strict scrutiny burden here.

Texas's principal substantive argument in defense of District 35's race-based configuration is that the district court's interim map did not alter it. J.S. 33-34. But as set forth above, *supra* Part II, the district court specifically warned the State *not* to rely on its "preliminary determinations." The abundant caveats accompanying the interim plan provided Texas no legal *or* factual basis, let alone a "strong basis in

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[11] While it did not reach the question, the district court was "inclined to find that CD35 is not compact for § 2 purposes." App. 175a.

evidence," *Alabama*, 135 S. Ct. at 1274, to believe that § 2 required District 35's configuration.

Texas also seeks refuge in the district court's conclusion that § 2 required the creation of seven Latino-opportunity districts in South/West Texas. But just as in 2011, while the 2013 legislature "may have had a strong basis in evidence for believing" this undisputed fact, it "had no basis in evidence to believe that the *Gingles* preconditions were satisfied in Travis County such that a race-based majority-Hispanic district should be drawn there." App. 176a. As the district court found—and Texas does not dispute—"Travis County does not have Anglo bloc voting and thus does not meet the third *Gingles* precondition, *which mapdrawers knew*[.]" *Id.* 110a (emphasis added). Like the district court, this Court should reject Texas' invitation to bless its drawing of any old race-based district in any old configuration in purported service of § 2. While § 2 certainly mandates the creation of at least seven majority-minority districts in South/West Texas, Texas had no basis to believe—either in 2011 or in 2013—that § 2 mandated the creation of this particular version of District 35.

The district court was clear that "passage of time or the re-enactment of a plan including the identical district does not typically change any facts concerning which voters were placed within or without the district when it was drawn, unlike discriminatory intent, which can change over time." App. 38a n.36. The race-based placement of voters in District 35 has remained since 2011, and those voters continue to suffer constitutional injury with every ballot cast regardless of Texas's intent in the intervening years.

B. CD27 Violates the § 2 Results Test.

The district court expressly found that "the Legislature violated § 2 *in both result and intent*" in its configuration of District 27. App. 112a (emphasis added). With respect to Plan C185, the court found that "Plaintiffs demonstrated that approximately 200,000 Hispanic voters in Nueces County (a majority-HCVAP county) had a § 2 right that could be remedied but was not." *Id.* 181a. Those voters' § 2 right did not disappear by 2013. Those same Nueces County Latinos still have a § 2 right unremedied by Plan C235. *Id.* 117a. Thus, regardless of the motivation of either the 2011 or 2013 legislatures, the discriminatory impact on Latino voters in Nueces County who have been unlawfully deprived of the equal opportunity to elect their candidates of choice is still present in District 27.

Texas argues that the district court erred in finding a § 2 effects-based violation in District 27 and Nueces County. J.S. 29-30. According to Texas, since no more than seven Latino-opportunity districts could be created in the South and West Texas envelope, and since Plan C235 creates seven Latino-opportunity districts there, the first prong of the *Gingles* § 2 test has not been satisfied. *Id.* Appellees and the district court both agreed that seven Latino-opportunity districts are required in the area. App. 112a. But that conclusion is the beginning, not the end, of the § 2 inquiry.

Texas's argument falters because it fails to account for the invalid racial gerrymander of District 35. Once that constitutional violation is unraveled, removing the Travis County Latinos that were gerrymandered into the district, a Latino-opportunity district still must be established somewhere in the envelope to

replace it. This means that Nueces County and its large Latino population must be pulled back into the envelope in order to meet the State's § 2 obligation of having seven Latino-opportunity districts there. *See* Supp.App. 300a (FF359) ("Including the population of Nueces County in the envelope makes it easier to draw seven Latino opportunity districts under § 2 without including Travis County.").

This is the very thing Texas chose *not* to do when it designed Districts 27 and 35. It took Nueces County Latinos who had a § 2 right and put them in an Anglo-dominated district where their rights could not be exercised. In exchange, Texas carved up Travis County racially, placing nearly 150,000 Travis County Latinos in District 35, even though they did not have a § 2 right. In short, it engineered a trade that took § 2 rights from those having them and gave those § 2 rights to those who did not have them. *LULAC v. Perry* holds that such a trade is itself a § 2 violation.

> The Court has rejected the premise that a State can always make up for the less-than-equal opportunity of some individuals by providing greater opportunity to others. . . . [T]hese conflicting concerns are resolved by allowing the State to use one majority-minority district to compensate for the absence of another only when the racial group in each area had a § 2 right and both could not be accommodated.

548 U.S. at 429.[12] "Simply put, the State's creation of an opportunity district for those without a § 2 right

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[12] The State's own expert equated Plan C235's treatment of Nueces County Latinos in District 27 with the treatment of

offers no excuse for its failure to provide an opportunity district for those with a § 2 right." *Id.* at 430. Yet, this is the very thing the district court found that the State did. App. 190a (finding *Gingles* factors satisfied in challenge to District 27).

Even though the district court's invalidation of District 27 expressly relied on *LULAC v. Perry*'s disapproval of unbalanced § 2 trade-offs, App. 181a, Texas does not cite *LULAC* in its defense of District 27, or so much as address the issue of trading off § 2 rights. Texas's failure to confront—let alone dispute—the basis for the district court's § 2 effects ruling is fatal to its appeal of the § 2 invalidation of District 27. "Under § 2, the State must be held accountable for the *effect* of [its] choices in denying equal opportunity to Latino voters." *LULAC*, 548 U.S. at 441-42 (emphasis added).

Webb County Latinos in District 23 in the plan invalidated in *LULAC v. Perry*. App. 182a.

CONCLUSION

The Court should dismiss the appeal for lack of jurisdiction or summarily affirm the Plan C235 order. It then should lift the stay and remand to the district court for further proceedings.

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No. 17-586

In the Supreme Court of the United States

GREG ABBOTT, ET AL., APPELLANTS,

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY SUPPORTING JURISDICTIONAL STATEMENT

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The plaintiffs' effort to repackage the district court's decision only highlights the district court's grave legal and factual errors. This Court should deny the plaintiffs' motion and note probable jurisdiction or summarily reverse.

I. This Court Has Jurisdiction to Review the District Court's Order.

The plaintiffs do not seriously dispute that the district court's order invalidating Plan C235 had the practical effect of precluding its use in the 2018 elections. Nor could they, as the district court held that CD27 and CD35 "violate § 2 and the Fourteenth Amendment," and that those violations "must be remedied." J.S. App. 118a. It made clear that if the Legislature did not immediately redraw the districts, the court would—and would do so in time for the 2018 elections. After all, the court would not have needed to put the Governor on a 72-hour deadline and otherwise rush to redraw the map if it had not already determined that the existing map could not be used in 2018. Indeed, the plaintiffs themselves implicitly concede that the State has been enjoined from using Plan C235 by urging this Court to "remand to the district court in time for implementation of a remedy for the 2018 election cycle." Mot. 4.

The plaintiffs nonetheless claim that this Court lacks jurisdiction because the district court has not yet issued a replacement for the map it enjoined. The plaintiffs confuse whether the court's order is its final order in the case with whether it is an injunction. An injunction does not have to definitively resolve the case; it just has to prevent the appealing party from doing some-

thing.[1] That, the district court's order plainly does. Unlike *Gunn v. University Committee to End the War in Viet Nam*, 399 U.S. 383 (1970) (cited at Mot. 16), there is no question what "was to be enjoined" or "against whom" the injunction would run, *id.* at 388. The district court's order is clear: it prevents Texas from using Plan C235 in the 2018 elections because the court found that CD27 and CD35 violate the Constitution.

This Court routinely reviews orders blocking a State from using its existing districts. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Gill v. Whitford*, No. 16-1161 (U.S.). That review is consistent with this Court's longstanding view that appellate jurisdiction over injunctions turns on the "practical effect" of the lower court's order, not its form or use of magic words. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981). That *Carson* interpreted §1292(a)(1), rather than §1253, does not matter. Because §1292(a)(1) and §1253 use materially identical language to vest jurisdiction over "orders" "granting" an "injunction," *Carson*'s reasoning applies to both. This is especially so given that *both* provisions—not just §1292(a)(1), *see* Mot. 17—are interpreted narrowly. *See Carson*, 450 U.S. at 84 ("[W]e have construed the statute narrowly."). Far from expanding *Carson*, then, requiring magic words under §1253 would

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[1] The plaintiffs' argument that "a request for submission of proposed remedial plans," is not an appealable order, Mot. 18, makes the same mistake. Of course that would not typically be an appealable order, because it would be neither a final order *nor an injunction*.

artificially restrict *Carson* and the jurisdiction that Congress has conferred on this Court.

II. The 2013 Legislature Did Not Engage in Intentional Discrimination When It Enacted the Court-Ordered Plan as Its Own.

On the merits, the plaintiffs attack a strawman. They repeatedly insist that the 2013 Legislature's decision to enact the district court's remedial map did not "immunize" Plan C235 from judicial review. Defendants have never suggested otherwise. Defendants have argued only that the 2013 Legislature's decision to repeal the 2011 map and replace it with the district court's remedial map is the relevant decision for purposes of determining the Legislature's intent. And the 2013 decision was exactly what it purported to be: a good-faith effort to comply with the Constitution and the VRA, bring costly and protracted litigation over the 2011 map to an end, and establish permanent congressional districts for the decade. The plaintiffs' fabricated tale of nefarious intent has no basis in reality, and it willfully ignores the Legislature's good-faith effort to address the potential infirmities that the district court had identified.

To be sure, when the Legislature adopted the court-imposed plan as its own, it certainly "assumed the risk" that districts in Plan C235 "might not withstand full scrutiny," Mot. 23, on claims *against that plan*, and the district court was free to consider such claims. But Article III did not permit the court to hold onto moot claims against the never-implemented 2011 plan in an effort to give the plaintiffs an advantage in their attack

on the 2013 plan. J.S. App. 348a (Smith, J., dissenting) ("Article III contains no exception . . . that allows us to resurrect dead claims in order to make it easier for plaintiffs to pursue live ones."). Indeed, the plaintiffs notably do not even respond to defendants' argument that the district court's adjudication of the moot challenges to the 2011 plan was an impermissible advisory opinion. In all events, nothing in this Court's precedents permitted the district court to hold the 2013 Legislature responsible for wrongs that it believed (albeit erroneously) the 2011 Legislature committed.

The plaintiffs' contrary contentions are a study in revisionist history. They first attempt to avoid the district court's incredible conclusion that the Legislature engaged in intentional discrimination by adopting *the court's own remedial map* by claiming that the 2013 Legislature "simply repeal[ed] and reenact[ed]" the map enacted by the 2011 Legislature. Mot. 19-20. That contention blinks reality. The 2013 Legislature repealed the 2011 map and replaced it with a new remedial map imposed by the district court and designed to remedy identified problems and comply with the VRA, the Constitution, and this Court's instructions in *Perry v. Perez*, 565 U.S. 388 (2012) (per curiam). That court-ordered remedial map preserved some of the lines from the 2011 plan, but it also substantially amended that plan in many respects. And it altered and preserved lines in accordance with this Court's mandate to "draw interim maps that do not violate the Constitution or the Voting Rights Act." *Id.* The 2013 Legislature thus no more

"simply repeal[ed] and reenact[ed]" the 2011 plan than the district court did when it imposed Plan C235.

The plaintiffs' effort to recast the Legislature's adoption of the court-ordered remedial plan as a sinister plot to discriminate against minority voters likewise has no basis in reality. Following this Court's mandate to "draw interim maps that do not violate the Constitution or the Voting Rights Act," *Perez*, 565 U.S. at 396, the district court did not redraw CD27 because it concluded that it likely did not intentionally dilute minority voting strength and did not redraw CD35 because it concluded that it likely was not a racial gerrymander. *See* J.S. App. at 408a-415a, 417a-423a. And the 2013 Legislature embraced Plan C235 as its own precisely because the district court had concluded that Plan C235 likely complied with the Constitution and the VRA. To be sure, that determination was a preliminary one and did not render the 2013 map immune from challenge. But the district court's preliminary assessment certainly gave the Legislature a good-faith basis to believe that adopting Plan C235 as its own would achieve compliance with the Constitution and the VRA.

That is particularly true given that the legal standards applied by the district court were more generous to plaintiffs than the requirements for a final judgment. To the extent it considered intentional-discrimination claims under VRA §5, the court applied a permissive "not insubstantial" standard. J.S. App. 396a. The remaining claims were considered under the standard for preliminary injunctions, J.S. App. 415a, 423a, which requires only a showing that the plaintiff is *likely* to suc-

ceed, not that it will actually do so. The Legislature thus adopted Plan C235 only after the district court determined that plaintiffs' challenges to CD27 and CD35 did not even meet those lenient standards. If repealing a challenged redistricting plan and replacing it with a remedial map imposed by the very court presiding over the redistricting litigation—after the court concludes that challenges to that map are unlikely to succeed—is evidence of intentional discrimination, it is hard to imagine what a State could ever do to avoid an intentional-discrimination charge.

Rather than answer that question, the plaintiffs insist that the 2013 Legislature adopted Plan C235 in a sinister effort to "insulate" its map from judicial review. If all plaintiffs mean is that the Legislature adopted the Court's remedial plan with the modest hope of ending the litigation and maximizing its chances of complying with the VRA and Constitution, then they are correct. But there is nothing sinister about that. To the extent plaintiffs mean that the Legislature asserted immunity from judicial review, that is just not true. Of course courts may review the districts for discriminatory effects, and of course courts may review the actions of the 2013 Legislature for discriminatory purpose. But what courts may not do is ignore the distinct intent behind the 2013 enactment and charge the *2013* Legislature with discriminatory intent for failure to "cure" the purported discriminatory intent of the *2011* Legislature, as discriminatory *intent* does not carry over from one law to another.

Hunter v. Underwood, 471 U.S. 222 (1985), does not suggest otherwise. *Hunter* did not involve a legislature's adoption of a court-ordered remedy, let alone such an act taken after that court issued an opinion explaining how the court-ordered remedy complied with all applicable federal law. Indeed, *Hunter* did not involve the adoption of new legislation at all. *Hunter* merely considered whether the passage of time removed the original discriminatory intent behind a state constitutional provision that had been in effect for 80 years and concededly "was motivated by a desire to discriminate against blacks on account of race." *Id.* at 233.

It is thus absurd for plaintiffs to claim this case is "indistinguishable" from *Hunter*. Mot. 22. Rather than rely on the passage of time to alleviate the alleged discriminatory intent behind the 2011 plan, the 2013 Legislature passed new legislation: It repealed the 2011 plan before it took effect and adopted the district court's remedial plan in its place. Far from supporting the plaintiffs' claim that the 2011 Legislature's intent could nonetheless doom Plan C235, *Hunter* expressly *reserved* the question of whether the same law "would be valid if enacted today without any impermissible motivation." 471 U.S. at 233. And here, the Legislature did not even reenact the same law, but enacted a different law that fixed all the problems a federal court had identified with the previous legislation. *Hunter* has nothing to say about that scenario.

At bottom, the plaintiffs' defense of the district court's order has no basis in law or fact. When the 2013 Legislature adopted the court's remedial plan, it had

every reason to believe that the plan complied with the Constitution and the VRA. After all, the district court itself had concluded that the plan likely did, and that was the best legal advice the Legislature could hope for. The plaintiffs' baseless attempt to impugn the Legislature's motives is irreconcilable with "the presumption of good faith that must be accorded legislative enactments," and the courts' duty to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). The plaintiffs' claims fail even without that presumption, but they certainly cannot succeed in the face of it.

III. Districts 27 and 35 Were Not Infected With Any Discriminatory "Taint."

Even assuming the 2011 Legislature's intent were relevant to the plaintiffs' challenges to the 2013 map, the plaintiffs' arguments fail on their own terms because the 2011 versions of Districts 27 and 35 were not infected with any discriminatory "taint."

A. There Was No Vote Dilution in CD27.

This Court has long held that a discriminatory-purpose finding requires evidence that the legislature "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). It is therefore legal error to base a finding of discriminatory intent on the legislature's mere "awareness of consequences." *Id.*

That is exactly what the district court did in finding that the Legislature's awareness that some Hispanic voters would reside in a Republican-leaning congressional district sufficed to establish intentional racial discrimination. Indeed, the only factual finding the plaintiffs cite—that "more than 200,000 Latinos in Nueces County 'who had been in an opportunity district were no longer in such a district,'" Mot. 24 (quoting Supp.App. 299a-300a)—is quintessential evidence of mere awareness. If that alone sufficed to establish discriminatory intent, then a State would effectively be required to retain all previously existing minority-opportunity districts—a requirement found nowhere in the Constitution or VRA §2.

In any event, CD27 resulted from race-neutral considerations. As Judge Smith explained in dissent, "Blake Farenthold, an Anglo Republican, was a[] surprise winner in the 2010 Republican sweep," and so "[t]he Republican legislature set out to protect him." J.S. App. 356a (Smith, J., dissenting). The permissible desire to protect an incumbent—not race—therefore "drove the decisions made . . . in Nueces County and throughout CD27." J.S. App. 351a. The plaintiffs cannot transform that decision into a race-based decision by substituting "Anglo-preferred" for "incumbent." Mot. 2.

Nor does the evidence support a finding of discriminatory effect. The plaintiffs ignore black-letter law that establishing a vote-dilution claim "requires the possibility of creating more than the existing number of" minority-opportunity districts—the first *Gingles* requirement. *LULAC v. Perry*, 548 U.S. 399, 430 (2006) (quot-

ing *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994)). If no such possibility exists, there is no VRA §2 right to remedy; the State may exercise its judgment to draw district lines. *Id.* at 429-30. That is precisely what the Legislature did here: it drew the maximum number (seven) of minority-opportunity districts, recognizing that some minorities (here, Nueces County Hispanics) would not be in a minority-opportunity district. That is perfectly legitimate under VRA §2 and this Court's precedents. Since Nueces County Hispanics are not sufficiently numerous to form a majority, they too suffer from "the absence of [a] critical *Gingles* factor." Mot. 2.

The plaintiffs contend that they nonetheless suffer vote-dilution because the State "engineered a trade that took § 2 rights from those having them [in Nueces County] and gave those § 2 rights to those who did not have them [in CD35]." Mot. 32. This strained analogy to *LULAC v. Perry* is unfounded. In *LULAC*, the State attempted to compensate for the elimination of a compact minority-opportunity district with a district that lacked a reasonably compact minority population, *LULAC*, 548 U.S. at 433-35. Here, there is no dispute that CD35 provides a compact minority group the opportunity to elect candidates of its choice.

Even if some *part* of CD35 does not demonstrate racial bloc voting, it does not follow that the Legislature was forbidden to draw the district, much less that it was obligated to keep Nueces County in CD27. "The ultimate object of the inquiry . . . is . . . the district as a whole." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017).

B. CD35 Was Not Racially Gerrymandered.

The plaintiffs' argument that the 2013 Legislature racially gerrymandered CD35, Mot. 27, suffers from several serious flaws. First, the plaintiffs' contention that motive is irrelevant to a racial gerrymandering claim is plainly wrong. To be sure, racial gerrymandering need not be the product of invidious discrimination. But it must still be the product of *intentional* sorting of voters on the basis of race. *See, e.g.*, *Miller*, 515 U.S. at 913. The plaintiffs cannot make that showing because "the 2013 Legislature did not draw the challenged districts in Plan C235." J.S. App. 34a.

Even if the 2011 Legislature's intent mattered, moreover, several significant problems would remain with the plaintiffs' argument that the Legislature lacked a strong basis in evidence for drawing CD35 as it did because it failed to establish that *Gingles*' prerequisites were met in the Austin area. Mot. 30. First, that argument implies that a State has no discretion in determining how to comply with the VRA. But this Court rejected that theory in *Bartlett v. Strickland* when it held that "§ 2 allows States to choose their own method of complying with the Voting Rights Act." 556 U.S. 1, 23 (2009). The plaintiffs admit that VRA §2 required seven minority-opportunity districts in South/Central/West Texas, and they do not dispute that CD35 covers that area. Mot. 30. Nevertheless, they argue that the State could not adopt "this particular version" of CD35 unless it proved that §2 required it. Mot. 30. That principle has no basis in law and would choke off what little breathing

room States have in balancing the competing demands of the Constitution and the VRA.

Second, the plaintiffs' assertion that the State may not draw a minority-opportunity district unless it proves that §2 requires the precise lines selected would turn *Gingles* on its head. *Gingles* is a guard against vote dilution, *see Thornburg v. Gingles*, 478 U.S. 30, 47 (1986), not a rigid limit on the State's ability to draw minority-opportunity districts. The plaintiffs do not argue that CD35 deprives minority voters in Travis County of "an equal opportunity to participate in the political processes and to elect candidates of their choice." *Id.* at 44 (quotation marks omitted). Nor could they, as CD35 undisputedly is a minority-opportunity district.

Third, the plaintiffs' argument erroneously focuses on only a small portion of CD35, not the entire district, as this Court's precedent requires. *See Bethune-Hill*, 137 S. Ct. at 800.

CONCLUSION

The Court should deny the plaintiffs' motion and note probable jurisdiction, or summarily reverse the district court's order invalidating Plan C235.

Respectfully submitted.

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No. 17-586

In the Supreme Court of the United States

GREG ABBOTT, Governor of Texas, *et al.*,
Appellants,

v.

SHANNON PEREZ, *et al.*,
Appellees.

On Appeal to the United States District Court for the Western District of Texas

BRIEF FOR LOUISIANA, ALABAMA, MICHIGAN, MISSOURI, OHIO, SOUTH CAROLINA, AND WISCONSIN AS *AMICI CURIAE* SUPPORTING APPELLANTS

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STATEMENT OF INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are the States of Louisiana, Alabama, Michigan, Missouri, Ohio, South Carolina, and Wisconsin. The States have a vital interest in the law regarding redistricting, since redistricting is inherently a State function. The District Court's ruling, throwing elections into disarray, has widespread implications for States entering the 2018 election cycle and the coming 2020 redistricting cycle, destabilizing the democratic system in all States. Additionally, the District Court's ruling undermines the ability of States to rely in good faith on the plain language of a District Court opinion.

SUMMARY OF ARGUMENT

The State of Texas has requested that this Court should note probable jurisdiction or summarily reverse the District Court's decision to invalidate *its own* Plan C235. The need to even make this request is remarkable. We agree with Texas's request, as the District Court's decision not only overturns a valid *judicially-drawn* map, but also upends decades of precedent from this Court recognizing States have the primary duty of deciding the political question of district maps and flips the burden to a State to *prove* to

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, nor made a monetary contribution specifically for the preparation or submission of this brief. The State of Louisiana paid for this brief. *Amici curiae* file this brief with the written consent of all parties, copies of which are on file in the Clerk's Office. All parties received timely notice of *amici curiaes'* intention to file this brief.

a court that the District Court's *own map* contained no intent adverse to the Constitution and the Voting Rights Act ("VRA"). This is, plain and simple, an attack on the fundamental sovereignty of States. Nothing in the VRA establishes any standard by which a State must hold debate on a legislative map, particularly one drawn by a court itself for the express purpose of complying with the laws. Moreover, congressional districts 35 and 27—the remaining congressional districts from the 2011 map—did not violate the VRA as neither was an impermissible gerrymander, nor was it possible to draw an additional majority-minority district in Texas. For the foregoing reasons, this Court should note probable jurisdiction or summarily reverse the District Court's decision.

ARGUMENT

I. THE DISTRICT COURT ERRED BY IMPROPERLY "LOCKING IN" A FINDING OF UNLAWFUL INTENT FROM A 2011 LEGISLATIVE ACT.

The District Court concluded the Texas Legislature possessed a discriminatory purpose in violation of § 2 and the Fourteenth Amendment by furthering the 2013 plan, which had been drawn and ordered to be implemented by that very court.[2] Specifically, the District Court stated that the decision to adopt the 2013 plan was "not an attempt to adopt plans that fully comp'ied with the VRA and the Constitution," but was

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[2] The District Court adopted the same flawed thinking when it reviewed Texas' State districting plan. *See Perez v. Abbott*, No. SA-11-CV-360, 2017 U.S. Dist. LEXIS 136226. *Amici* address this flawed reasoning in *Amici*'s The State of Louisiana, *et al.*, Jurisdictional Statement in *Abbott v. Perez*, No. 17A245 (2017).

merely "a litigation strategy designed to insulate the 2011 or 2013 plans from further challenge, regardless of their legal infirmities." *Perez v. Abbott*, 2017 WL 3495922 *35, 2017 U.S. Dist. LEXIS 129982 (W.D. Tex. Aug. 15, 2017) (hereinafter "Order Overturning Plan C235"). The District Court reached this conclusion by reasoning that the "discriminatory taint" it found present in the 2011 plan had not been removed by enactment of the court's 2013 Plan because "specific portions of the 2011 plans that [it] found to be discriminatory or unconstitutional racial gerrymanders continue unchanged in the 2013 plans" and therefore illegally further existing intentional discrimination. Order Overturning Plan C235 *33, 39.

The District Court's conclusion rests on an improper application of law, circular reasoning, and speculation. The Court glosses over the fact that the 2013 Plan, regardless of whether it shares some district lines with the 2011 Plan, was found by *that same court* to expressly comply with the standards set forth in *Perry v. Perez*, 565 U.S. 388 (2012), § 2, and the Fourteenth Amendment. *Perez v. Perry*, 891 F. Supp. 2d 808 (W.D. Tex. 2012) (hereinafter "Order Adopting Plan C235"). In drawing and ordering the adoption of the 2013 Plan the District Court went to great lengths to emphasize that it was aware of the guidance set forth by Supreme Court's ruling in *Perry v. Perez*, 565 U.S. 388 (2012), and that the plan complied therewith. Order Adopting Plan C235 at 816.

In accordance with this guidance, the District Court independently reviewed "as much of the record as possible," concluded the 2013 Plan resolved the § 5 claims and that "no § 2 or Fourteenth Amendment

claims preclude[d] its acceptance," and ordered the Legislature to adopt it. Order Adopting Plan C235 at 825. This represents a careful expression by the Court that it drew a plan free from the legal defects present in the 2011 Plan.

This is not an instance where a legislature intentionally adopted a plan which has an invidious purpose, as the District Court indicates. The Legislature has not reenacted an intentionally discriminatory plan. Rather, the Legislature merely adopted a plan that was judicially drawn and judicially approved as constitutional and free from discriminatory intent. It follows that for the Legislature to be furthering preexisting intentional discrimination, *the District Court itself* would have to possess discriminatory intent in drawing and approving the plan, despite its clear statement that the plan was designed to eliminate any underlying legal defects. Indeed, a court-drawn map, such as the 2013 Plan, is subject to a far higher standard than one drawn by a legislature. *See, e.g.*, *Wise v. Lipscomb*, 437 U.S. 535, 541 (1978) (noting that courts lack "political authoritativeness" and must act "in a manner free from any taint of arbitrariness or discrimination" in drawing remedial districts) (quoting *Connor v. Finch*, 431 U.S. 408, 417 (1977)); *Wyche v. Madison Par. Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts."); *Wyche v. Madison Par. Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981) (noting that "a court is forbidden to take into account the purely political considerations that might be appropriate for legislative bodies");

Favors v. Cuomo, Docket No. 11–cv–5632, 2012 WL 928216, at *18 (E.D.N.Y. Mar. 12, 2012), *report and recommendation adopted as modified*, No. 11-cv-5632, 2012 WL 928223, at *6 (E.D.N.Y Mar. 19, 2012); *Molina v. Cty. of Orange*, No. 13CV3018, 2013 WL 3039589, at *8 (S.D.N.Y. June 3, 2013), *supplemented*, No. 13CV3018, 2013 WL 3039741 (S.D.N.Y. June 13, 2013), *report and recommendation adopted*, No. 13 CIV. 3018 ER, 2013 WL 3009716 (S.D.N.Y. June 14, 2013); *Larios v. Cox*, 306 F. Supp. 2d 1214, 1218 (N.D. Ga. 2004); *Balderas v. Texas*, No. 6:01CV158, 2001 WL 36403750, at *4 (E.D. Tex. Nov. 14, 2001). The fact that the 2013 Plan may share some lines with the 2011 Plan is of no legal significance because the District Court adopted those lines as its own.

Given the clear, express conclusion of the District Court in 2012, paired with the guidance in *Perry v. Perez*, it was logical for some portions of the 2011 Plan to remain in the 2013 Plan and it was similarly logical for the 2013 Plan to be adopted by the Legislature without change. The discriminatory intent the Court found in the 2011 Plan cannot logically or legally be said to have carried over to the 2013 Plan merely because some portions of the 2011 Plan are encompassed therein. Indeed, the Supreme Court *instructed* the District Court and Legislature to look to the legal portions of the 2011 Plan in building a new plan and the District Court found that the 2013 Plan complied with the Supreme Court's standards. Order Adopting Plan C235 at 838. Simply put, the 2013 Plan is a new plan, untainted by any underlying discriminatory purpose or intent from the 2011 Plan because the District Court's findings and orders in

2012 necessarily removed any "taint." See string cite, *supra* at 4–5.

With the presumption of constitutionality afforded to legislative acts, none of the findings that the District Court makes aid in its conclusion that the Legislature intentionally furthered pre-existing discriminatory purpose in enacting the 2013 Plan. On the contrary, the District Court's findings as to intent serve only to undercut its own conclusions. As the District Court notes, the Legislature adopted the 2013 Plan and, in an apparent effort to avoid further litigation, did not amend it. How could the Legislature wish to avoid further litigation if it was adopting a plan supposedly rife with legal infirmities? The District Court's illogical supposition that the Legislature adopted the 2013 Plan as part of a trial strategy is bizarre but, if true, it should actually stand *against* the proposition that the Legislature was intentionally furthering an existent purposeful discrimination.

If the District Court is allowed to impute the intent of the Legislature when enacting the 2011 Plan onto a different act, the enactment of the Court-ordered 2013 Plan, potential ramifications flow well beyond this case. The District Court's holding essentially stands for the proposition that any legislative enactment once found to have been motivated by what a court deems to be discriminatory intent, can *never* be cured – even when new maps rely upon a court order. If this circular logic stands, it will work extreme unfairness to States by calling into question the finality of judgments. States will never be sure if court orders are valid or reliable and therefore risk years of ongoing litigation. Moreover, such reasoning would require legislatures

similarly situated to scrap existing maps and redraw *all* of their electoral districts. A comprehensive redraw would occur at enormous cost to taxpayers and would slow the legislative process to an unnecessary crawl.

The District Court improperly imputed the finding of unlawful intent from the 2011 Plan onto the 2013 Plan, thereby invalidating the very plan that it drew, approved, and ordered enacted. Plainly stated, the 2013 Plan is a new plan, cleansed of any discriminatory "taint" by the District Court's earlier finding that the plan was free from constitutional violations and violations of the VRA.

II. THE DISTRICT COURT ERRED BY HOLDING THE LEGISLATURE'S DELIBERATIVE PROCESS TO AN UNDEFINED QUALITATIVE OR QUANTITATIVE STANDARD.

The District Court erred by manufacturing new requirements by suggesting the Legislature did not engage in a sufficiently robust deliberative process. *First*, no such deliberative process is required by any federal or state law. *Second*, even if such a process was required, the Legislature fulfilled those requirements by passing *the very map* drawn by the same District Court.

A. The Voting Rights Act and General Principles of Judicial Review Require Judicial Deference to the Decisions of a State Legislature.

In reviewing the actions of a state legislature on any subject, a court should start from a position of deference, rather than suspicion. Here, however, the lower court not only withheld the deference due on the

political question of redistricting, but also failed to give deference *to itself and its precedent*.

Drawing lines for congressional districts is "primarily the duty and responsibility of the State." *See Shelby Co. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *Perry*, 565 U.S. at 392). "Reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993). Because the "States do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law," the federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements. *Voinovich*, 507 U.S. at 156 (internal citations omitted). *See also Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 593 (N.D. Ill. 2011) (refusing to replace a state legislature's enacted plan "with one that inhibits its legitimate objectives while advancing the objectives of the minority political party at the time of redistricting.").

"In any event," the role of the judiciary "is not to determine whether the procedural choices made by the legislature were the best among a range of options, whether the legislative action had to reflect the testimony received at the public hearings, or whether the legislature was required to consider that testimony or input during its redistricting deliberations. [A court's] task, instead, is to determine whether the legislature's actions violated federal law." *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1298 (S.D. Fla. 2002). "The courts, in assessing the sufficiency of a challenge to a

districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). Only when race is the "predominant factor motivating the legislature's redistricting decision" will strict scrutiny apply. *Bush v. Vera*, 517 U.S. 952, 959 (1996).

This series of specific limits as to federal court oversight on redistricting plans should be applied to this case without further explanation. However, even on matters of policy and fact-finding generally, this Court has also long extended significant deference to state legislatures. "States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456,463-64 (1981) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979) and citing *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952) and *Henderson Co. v. Thompson*, 300 U.S. 258, 264-65 (1937)). So long as there is "evidence before the legislature reasonably supporting the classification," a duly enacted piece of legislation should not be invalidated even if a challenger could "tender[] evidence in court that the legislature was mistaken" *Id; see also* Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, Faculty Scholarship, Paper 74 (2005), *available at* http://scholarship.law.upenn.edu/faculty_scholarship/74. Based solely on the plain language of the District Court in the Order Adopting Plan C235, the

Legislature had ample evidence to suggest the plan fully complied with all requirements of the Constitution and the VRA.

B. Even If Some Deliberative Process Is Required, the Legislature Fulfilled Those Requirements by Passing the Court-drawn District Map.

Attempting to apply a time- or quality-based "deliberation" standard pursuant to which a state legislature must consider district maps is inherently flawed.

First, the legislative process is inherently "deliberative," and it is *highly* irregular for a federal district court to measure the *amount* of deliberation within an inherently deliberative process. Texas, like most states, follows a legislative process dictated by its state constitution and House and Senate rules. In the absence of some alleged violation of that process, no known precedent supports measuring how long or how deeply a legislature "deliberates" on matters it passes. The District Court's ruling implies some greater duty exists to "deliberate" beyond that required by the State's constitution, but even more disturbingly that a federal court can *measure* it.

Some state legislatures are full-time and some are part-time. Some have aggressive policy agendas based on a newly-elected governor or party flip in the majority, and some have the stability of a multi-term governor or decades of single-party control. Not only is such a duty vague and unfounded in law or the Constitution, it would be in abject violation of this Court's holdings in *Northwest Austin Mun. Util. Dist.*

No. One v. Holder, 557 U.S. 193, 203 (2009) describing a "fundamental principle of equal sovereignty" among the States. This Court cannot impose one-size-fits-all requirements on a multitude of sovereign states.

III. THE DISTRICT COURT RULING EVISCERATES THE PRESUMPTIONS OF CONSTITUTIONALITY AND GOOD FAITH.

The Court should note jurisdiction or summarily reverse on the basis that it failed to apply this Court's well-established principle of the presumption of good faith accorded to legislative enactments and the District Court's further failure to exercise extraordinary caution. Instead of applying or even acknowledging the long-standing principle that "the presumption of good faith that must be accorded legislative enactments," *Miller v. Johnson*, 515 U.S. 900, 916 (1995), the District Court, in further failing to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race," instead chose to declare Plan C235 unlawful by applying a presumption of invalidity when the Texas Legislature acted on the basis of the District Court's own ruling. This presumption means that plaintiffs, not the legislature, bear the "demanding" burden of showing impermissible motivation behind the legislative enactment at issue; any doubt or failure on plaintiffs' part to do so must be resolved in favor of the state. *Id.*

The District Court completely eviscerated the presumption of good faith when it decided that the State's action was unconstitutional. This leaves nothing left of the long-standing presumption of validity afforded to state legislative enactments and

usurps one of the most basic political functions of state legislatures. Following the District Court's logic, the federal judiciary may replace any duly enacted reapportionment plan without regard for the discretion and judgment used by a state in balancing the many intricate factors that go into such a fundamental democratic practice.

The implications are enormous. If the District Court's ruling is permitted to stand, there is nothing left to bar the federal judiciary's "serious intrusion on the most vital of local functions," *Miller v. Johnson*, 515 U.S. 900, 915 (1995), and likewise, nothing left of the mandate that federal courts must "exercise extraordinary caution" in redistricting cases and afford states a presumption of constitutionality and good faith. *Miller*, 515 U.S. at 916. Time and again this Court has similarly held that where legitimate motives exist, government action is presumed valid and a court may not automatically infer an unlawful purpose. *See, e.g., U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (beginning the inquiry by "noting the heavy presumption of constitutionality to which a carefully considered decision of a coequal and representative branch of our Government is entitled."); *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (refraining from inferring discriminatory purpose on the part of the state where the state had legitimate reasons to adopt and maintain capital punishment); *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) (presumption of regularity and proper discharge of official duties absent clear evidence to the contrary); *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918) (good faith and validity of actions presumed).

What is truly extraordinary is that the District Court wholly failed to acknowledge *its own reasoning and analysis* in support of the validity of Plan C235 as a good faith basis for Texas' 2013 enactment and implementation of the Plan. In so doing, the Court repudiates its own findings and the lawfulness of its own order. Even without additional justification, the simple fact of the matter is that when the Court entered an order directing Texas to adopt Plan C235, this order alone constituted a legitimate, good faith basis for the enactment of the legislation. The record is absent of any basis on which to infer that the 2013 Legislature had an improper purpose in adopting the Plan. Under a proper application of this Court's precedent and the presumption of good faith and constitutionality, the District Court's ruling must be overturned.

The Legislature's cautious approach in adopting the most obvious path forward to end the litigation was to adopt what the District Court had already found to be a valid remedy, which included both district lines that were altered as well as district lines that the Court found no basis to change. With the normal presumption of validity disemboweled, the District Court found the State action of relying upon the constitutionality of the District Court's own order unconstitutional. This constitutes clear legal error.

The District Court further erred when it applied the *Arlington Heights* factors, as the foundation for the "official action" of the state is the official action of the District Court itself. *See Cooper v. Harris*, 137 S. Ct. 1455, 1479-80 (2017) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)

(standards offered "a varied and non-exhaustive list of 'subjects' of proper inquiry in determining whether racially discriminatory intent existed'" while also reaffirming that the Court has "often held" the burden of proof on the plaintiff to prove race, not politics, "is demanding."(citations omitted)). Despite the legislature basing its action on the valid remedy of the District Court, the District Court still faulted it with a finding of discriminatory intent. The historical background of the action, the specific sequence of events leading up to the action, and the legislative history of the action all can be directly traced to the action of the District Court itself. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68. A legislature adopting a federal District Court plan as its own is hardly a substantive departure from the norm. *See id.*

The *Arlington Heights* framework guides how federal courts should go about finding whether a governmental entity acted with discriminatory purpose. Nowhere within that framework is there a blank check for federal courts to arbitrarily find constitutional violations on the sole basis that they disagree with states' chosen policies and internal democratic processes. *Arlington Heights* states that, while the impact of the official action may provide "an important starting point," impact alone "is not determinative and the court must look to other evidence." *Id.* at 266. Particularly, "the specific sequence of events leading up to the challenged decision also may shed light on the decisionmaker's purposes." *Id.* at 267 (citations omitted). The District Court here struck *four* different state legislative

actions,[3] including the extraordinary measure of the Legislature's acquiescence to Plan C235 *precisely as drawn by the District Court*. For the District Court, there was apparently nothing the Texas legislature could do to remedy the alleged violations. If a District Court can hold a state legislature acted unconstitutionally in adopting a court-drawn plan, there is absolutely nothing stopping other federal courts from inserting themselves into state deliberative processes and holding states hostage to this type of litigation in perpetuity. The precedent established by the District Court, that the judiciary can hold a state in such a damned-if-you-do damned-if-you-don't situation, is a wholly inappropriate overreach by the judiciary into the realm of state sovereign interests. This Court has held that "reapportionment is primarily the duty and responsibility of the State," *Chapman v. Meier*, 420 U.S. 1, 27 (1975), and "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915. The presumption of good faith carries particular weight in the context of redistricting legislation, and yet Texas was plainly not afforded such a presumption. This Court must refuse to allow the District Court its exercise of such unlimited discretion, particularly in this case affecting the most vital of state functions, and which profoundly implicate state sovereign interests

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[3] The House plan enacted in the regular session in 2011; the congressional plan enacted in the special session in 2011; the adoption in the 2013 special session of Plan C235 *as drawn by the District Court*; and, most recently, the adoption in 2013 of virtually all of the 2012 district-court-imposed map for the Texas State House of Representatives.

and their individual citizens' interests in representative democracy.

IV. THE DISTRICT COURT ERRED BY HOLDING THAT DISTRICT 35 IS A RACIAL GERRYMANDER.

A. The District Court Erred in Finding That Congressional District 35 Is an Impermissible Racial Gerrymander by Making Factual and Legal Determinations Based on an Analysis of Counties Rather than Districts.

The District Court further erred by engaging in a county-by-county analysis. In its Order Overturning Plan C235, the District Court found that "Nueces County Hispanic vote[r]s[sic] were deprived of their opportunity to elect candidates of their choice" and that additionally "Travis County does not have Anglo bloc voting and thus does not meet the third *Gingles* precondition." J.S. App. 110a. This county-by-county style analysis is a fundamentally incorrect application of *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), and this Court's further precedent. For *any* analysis to be sound under the VRA it must be conducted using the "*district as a whole*" and not any other political subdivision as the basis for study. *See Bethune-Hill* v. *Va. State Bd. Of Elections*, 137 S. Ct. 788, 800 (2017) (emphasis added).

Despite the clarity of the law, the District Court proceeded to examine and compare residents of two different counties without analyzing the congressional district they reside in as a whole. This Court clearly laid out the "three threshold conditions" in determining improper vote dilution under § 2 of the VRA. *Cooper*,

137 S. Ct. at 1470; *see also Gingles*, 478 U.S. at 50-51. The Court in *Cooper* explained that: "First, a 'minority group' must be 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured *legislative district*. Second, the minority group must be 'politically cohesive.' And third, a district's white majority must 'vote sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.'" *Cooper*, 137 S. Ct. at 1470 (emphasis added) (citing and quoting *Gingles*, 478 U.S. at 50-51) (internal citations omitted).

Fundamentally, the purpose of the three *Gingles* preconditions is to show that "'the minority [group] has the potential to elect a representative of its own choice' in a possible *district*, but that racially polarized voting prevents it from doing so in the *district* as actually drawn because it is "submerg[ed] in a larger white voting population.'" *Id.* (emphasis added) (citing and quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993)). In fact, the long and winding history of VRA legislation focuses on the *district as a whole*. *See Bethune-Hill*, 37 S. Ct. at 800 (2017) ("The ultimate object of the [Voting Rights Act] inquiry, however, is the legislature's predominant motive for the design of the *district as a whole*.") (emphasis added); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) ("Our *district-specific* language makes sense in light of the nature of the harms that underlie a racial gerrymandering claim.") (emphasis added); *Gingles*, 478 U.S. at 56 ("The amount of white bloc voting that can generally 'minimize or cancel' black voters' ability to elect representatives of their choice . . . will vary from *district to district* . . . .") (emphasis added) (internal citations omitted); *see generally Vera*, 517 U.S. at 952

(1996); *Shaw v. Reno*, 509 U.S. 630 (1993); *Hunt v. Cromartie*, 526 U.S. 541, 551-52 (1999). Therefore, this Court should note jurisdiction or summarily reverse because the District Court erred in its analysis of CD35.

B. The State Was Required to Draw a Majority-Minority District in the I-35 Corridor Due to Extensive Population Growth in That Area.

The State acted properly when it drew CD35 where it did so as a majority-minority district.[4] This Court in *Bethune-Hill* said:

> When a State justifies the predominant use of race in redistricting on the basis of the need to comply with the Voting Rights Act, "the narrow tailoring requirement insists only that the legislature have *a strong basis in evidence* in support of the (race-based) choice that it has made." That standard does not require the State to show that its action was "actually . . . necessary" to avoid a statutory violation, so that, but for its use of race, the State would have lost in court. Rather, the requisite strong basis in evidence exists when the legislature has "*good reasons to believe*" it must use race in order to satisfy the Voting Rights Act, "even if a court

[4] It is important to note that the 2011 map is not properly before the Court because that map is moot. This argument assumes *arguendo* that the 2011 map *is* properly before the Court; however, under any analysis, the District Court was incorrect to find that CD35 is a racial gerrymander.

> does not find that the actions were necessary for statutory compliance."

Bethune-Hill, 137 S. Ct. at 801 (emphasis added) (internal citations omitted) (quoting *Ala. Legis. Black Caucus*, 135 S. Ct. at 1274 (2015)). It can hardly be said that the State did not have a "*strong basis in evidence*" or "*good reasons to believe*" that a Hispanic opportunity district was necessary in this area.[5] *See Bethune-Hill*, 137 S. Ct. at 801. First, the District Court noted the tremendous increase in population the Austin/San Antonio I-35 corridor has seen.[6] J.S. App. 408a ("It is *undisputed* that much of Texas' overall population growth occurred in Bexar County and Travis County and the areas along the I-35 corridor.") (emphasis added). Second, the District Court "found that seven Latino opportunity districts were required . . . .") J.S. App. 112a. And finally, the fact that the District Court approved CD35 for use on what it terms an "interim"

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[5] An objection is appropriate for State House District HD90, which was adopted and amended due to objections by a Latino American group. *Amici* point the Court to The State of Louisiana, *et al.*, Jurisdictional Statement in *Abbott v. Perez*, No. 17A245 (2017) for a more rigorous analysis.

[6] This is a trend that has shown no signs of slowing. Between the decennial census and 2016 Texas experienced the greatest population increase of any state in the United States. *See* U.S. Census Bureau, American Fact Finder Annual Estimates of the Resident Population (2016) (available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2016_PEPANNRES&src=pt). A significant driver of the population growth in Texas is along the IH-35 corridor from the Austin-Round Rock MSA to the San Antonio-New Braunfels MSA. *See* Office of the State Demographer, Texas Demographic Center: Urban Texas – Part Two (2016) (available at http://demographics.texas.gov/Infographics/2017/UrbanTexasPt2).

basis, J.S. App. at a113, at the very least should be a "*good reason to believe*" that race was a permissible factor in adopting CD35.[7] *See Bethune*-Hill, 137 S. Ct. at 801. Furthermore, there is no basis to believe that CD35 is anything like the map struck down in *LULAC v. Perry*, 548 U.S. 399, 424-25 (2006). The map challenged in *LULAC* stretched from the Texas/Mexico border and wound its way up to Austin, over 300 miles away. *See* Texas Legislative Council, Texas Redistricting: Plan 01374C (2003) (available at http://www.tlc.state.tx.us/redist/pdf/chronology_plans/PLAN01374C.pdf). By comparison, CD35 adjoins two communities that experienced the significant portion of the State's population growth as a whole and are only 80 miles apart. Texas Legislative Council, Texas Redistricting: Plan c235, (2013) (available at http://gis1.tlc.state.tx.us/?PlanHeader=PLANc235). Therefore, for the aforementioned reasons, the District Court erred when it found CD35 was a racial gerrymander.

V. CONGRESSIONAL DISTRICT 27 DID NOT DILUTE MINORITY VOTING STRENGTH BECAUSE IT WAS IMPOSSIBLE FOR THE DISTRICT COURT OR THE TEXAS LEGISLATURE TO DRAW AN ADDITIONAL MAJORITY-MINORITY DISTRICT.

Impermissible vote dilution requires the "effect of diluting minority voting strength." *Shaw*, 509 U.S. at 640. As this Court stated, "a 'minority group' must be 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured

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[7] This assumes, *arguendo*, that the Legislature's approval of the interim map can be properly imputed to the State in the first instance.

legislative district." *Cooper*, 137 S. Ct. at 1470 (emphasis added) (citing and quoting *Gingles*, 478 U.S. at 50-51) (internal citations omitted). "Where an election district could be drawn in which minority voters form a majority but such a district is not drawn . . . then—assuming the other *Gingles* factors are also satisfied—denial of the opportunity to elect a candidate of choice is a present and discernible wrong . . . ." *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009). Consequently, if a district *cannot* be drawn then there can be no wrong. *See Id.* To assert a claim under § 2 the party asserting liability bears the burden of showing that "the minority population in the potential election district is greater than 50 percent." *Id* at 19-20; *see also Gonzalez v. Harris County*, 601 Fed. Appx. 255, 258 (5th Cir. 2015) ("The proposed plan must also encompass a district with a greater-than-50-percent voting-age minority population."). "The question [in *Strickland* is] *quantitative*, how many—not *qualitative*, what kind of people." *Reyes v. City of Farmers Branch Tex.*, 586 F.3d 1019, 1023 (5th Cir. 2009) (emphasis in original).

Here, the Appellees have *never* shown how the State could draw more than the seven compact Hispanic majority-minority districts, which is what the current plan has.[8] *See* J.S. App. 127a-131a. No matter what the State did with Hispanic voters in Nueces County—other than locking in their district—their population is insufficient to create a "greater-than-50-

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[8] The District Court makes the same error in its CD27 analysis as in its CD35 analysis, namely that the a county-by-county study is permitted when making determinations under § 2 of the VRA. *See Amici* of the States of Louisiana, *et al.*, *supra*, at 16-18.

percent voting-age" population. *See Strickland*, 556 U.S. at 19-20; J.S. App. at 113a. Furthermore, the fact that the Appellees failed to carry their burden should end the inquiry resulting in a finding of no vote dilutive effect. *See Strickland*, 556 U.S. at 19-20; *see also Gonzalez*, 601 Fed. Appx. at 258. The District Court itself determined that seven Hispanic opportunity districts were required. J.S. App. at 112a. There is no requirement that the State draw a court's preferred districts, instead "it is the domain of the States, and not the federal courts, to conduct apportionment in the first place." *See Voinovich*, 507 U.S. at 156. Finally, only "[i]f a State has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that §2 requires drawing a majority-minority district." *Cooper*, 137 S. Ct. at 1470 (emphasis added) (citing *Vera*, 517 U.S. at 978 (1996)). The State has two of the best reasons one can imagine for believing that *Gingles* one was not met in this case: 1) CD27 and 35 were adopted with the imprimatur of the District Court, and 2) it is not possible to demonstrate an additional Hispanic opportunity district is required or even possible in Texas. J.S. App. 112a ("The [District] Court found that seven Latino opportunity districts were required. . . ."); J.S. App. a127 ("The Supreme Court ruled that a nearly identical district [to those the Plaintiffs' proposed] in the same location was 'noncompact for §2 purposes.'") (citing *LULAC*, 548 U.S. at 435. Therefore, the District Court erred in finding CD27 impermissibly diluted minority voting strength, and this Court should note jurisdiction or summarily reverse to correct the District Court's error.

CONCLUSION

The United States District Court's decision below to overturn its own map, drawn for the express purpose of complying with the Constitution and the VRA, is as erroneous as it is egregious. In the absence of intervening precedent by this Court that would abrogate its Order Adopting Plan C235, the District Court simply cannot issue an order, cause States and voters to act in reliance on that order, and then simply change its mind on the eve of a deadline to redraw district maps for the 2018 elections. Moreover, the District Court's arbitrary *and suspicious* approach to the Legislature's action stands in blatant disregard to the deference afforded to states on this fundamental question of state sovereignty. Accordingly, *amici curiae* respectfully urge this Court to note probable jurisdiction or summarily reverse the District Court's decision.

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Nos. 17-586, 17-626

In the Supreme Court of the United States

GREG ABBOTT, ET AL., APPELLANTS

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JOINT APPENDIX

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Jurisdictional statements filed:
Oct. 17, 2017 (No. 17-586); October 27, 2017 (No. 17-626)
Jurisdiction postponed: January 12, 2018

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The following decision(s), opinion(s), order(s), and evidence have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Jurisdictional Statement in *Abbott v. Perez*, No. 17-586:

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APPENDIX B—ORDER ON PLAN C235 (August 15, 2017) 3a

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APPENDIX D—ORDER ADOPTING PLAN C235 (March 19, 2012) 367a

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The following decision has been omitted in printing this Joint Appendix because it appears on the following pages in the Supplemental Appendix to the Appellees' Motion to Dismiss or Affirm in *Abbott v. Perez*, No. 17-586:

FACT FINDINGS – GENERAL AND PLAN C185 (March 10, 2017) 1a

The following decision(s), opinion(s), order(s), and evidence have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Jurisdictional Statement in *Abbott v. Perez*, No. 17-626:

APPENDIX A—NOTICE OF APPEAL (August 28, 2017) 1a

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APPENDIX F—ADVISORY FROM DISTRICT COURT RE STAY (August 28, 2017) 436a

APPENDIX G—CONSTITUTIONAL AND STATUTORY PROVISIONS 437a

APPENDIX H—ATTORNEY GENERAL LETTERS TO 2013 LEGISLATURE 440a

The following decision has been omitted in printing this Joint Appendix because it appears on the following pages in the Supplemental Appendix to Appellee Mexican American Legislative Caucus's Motion to Dismiss or Affirm in *Abbott v. Perez*, No. 17-626:

FACT FINDINGS – PLAN H283
(April 20, 2017) 1a

The following evidence has been omitted in printing this Joint Appendix because it appears on the following pages in the Supplemental Appendix to the Motion to Dismiss or Affirm filed by Appellees Texas Latino Redistricting Task Force, et al. in *Abbott v. Perez*, No. 17-626:

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Trial Transcript, July 11, 2017 (Excerpts),
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IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, et al.,

Plaintiffs,

v.

STATE OF TEXAS, et al.,
Defendants.

CIVIL ACTION NO.
SA-11-CA-360-OLG-
JES-XR

[Lead case]

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
05/09/2011	1	COMPLAINT (Filing fee $ 350 receipt number 0542-3609997). No Summons requested at this time, filed by Harold Dutton, Jr, Shannon Perez. (Attachments: # 1 Civil Cover Sheet) (Richards, David) (Entered 05/09/2011)
05/09/2011		Case Directly Assigned to Judge Orlando L. Garcia. CM WILL NOW REFLECT THE JUDGE INITIALS AS PART OF THE CASE NUMBER. PLEASE APPEND THESE JUDGE INITIALS TO THE CASE NUMBER ON EACH DOCUMENT THAT YOU FILE

		IN THIS CASE. (ga) (Entered: 05/09/2011)
05/11/2011	4	ORDER Constituting Three-Judge Court to Judge Orlando L. Garcia, Judge Jerry E. Smith and Judge Xavier Rodriguez. Signed by Judge Edith H. Jones.(ga) (Additional attachment(s) added on 7/24/2014: # 1 Exhibit Complaint) (aej). (Entered: 05/11/2011)
07/01/2011	21	Minute Entry for proceedings held before Judge Orlando L. Garcia: Status Conference held on 7/1/2011 (Minute entry documents are not available electronically.). (Court Reporter Maurice West.)(ga) (Entered: 07/05/2011)
07/06/2011	23	ORDER OF CONSOLIDATION - consolidating this case with SA11-CV-361 and SA11-CV-490. Signed by Judge Orlando L. Garcia. (rf) (Entered: 07/06/2011)
07/06/2011	24	SCHEDULING ORDER, (Amended Pleadings due by 7/19/2011., Discovery due by 8/15/2011., Motions due by 8/15/2011., Bench Trial set for 9/6/2011 9:30 AM before Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith, Judge Xavier

		Rodriguez., Pretrial Conference set for 9/2/2011 9:30 AM before Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith, Judge Xavier Rodriguez.). Signed by Judge Orlando L. Garcia. (rf) (Entered: 07/06/2011)
07/08/2011	25	AMENDED SCHEDULING ORDER: Amended Pleadings and Joinder of Parties due by 7/19/2011. Discovery due by 8/15/2011. Dispositive Motions due by 8/15/2011. Pretrial Conference set for 9/2/2011 9:30 AM before Judge Orlando L. Garcia. Bench Trial set for 9/6/2011 9:30 AM before Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith, Judge Xavier Rodriguez. Signed by Judge Orlando L. Garcia. (ga) (Entered: 07/08/2011)
07/19/2011	50	AMENDED COMPLAINT Plaintiff MALC's Second Amended Complaint against Hope Andrade, David Dewhurst, Rick Perry, State of Texas, Joe Straus amending, filed by Mexican American Legislative Caucus, Texas House of Representatives.(Garza, Jose) (Entered: 07/19/2011)

07/19/2011	51	AMENDED SCHEDULING ORDER: Amended Pleadings and Joinder of Parties due by 7/19/2011. Discovery due by 8/17/2011. Dispositive Motions due by 8/17/2011. Signed by Judge Orlando L. Garcia. Pretrial Conference set for 9/2/2011 9:30 AM before Judge Orlando L. Garcia. Bench Trial set for 9/6/2011 9:30 AM before Judge Orlando L. Garcia.(ga) (Entered: 07/19/2011)
07/19/2011	53	AMENDED COMPLAINT against Hope Andrade, David Dewhurst, Rick Perry, State of Texas, Joe Straus amending, filed by Gregory Tamez, Harold Dutton, Jr, Shannon Perez, Nancy Hall, Dorothy DeBose, Carmen Rodriguez, Sergio Salinas, Rudolfo Ortiz.(Richards, David) (Entered: 07/19/2011)
07/19/2011	54	ADVISORY TO THE COURT by Rick Perry, State of Texas, Joe Straus *on the Status of the Preclearance Process.* (Schenck, David) (Entered: 07/19/2011)
07/19/2011	55	CROSSCLAIM against Hope Andrade, David Dewhurst, Rick Perry, State of Texas, Joe Straus,

		filed by Texas Democratic Party.(Dunn, Chad) (Entered: 07/19/2011)
07/19/2011	60	MOTION to Intervene by Texas Legislative Black Caucus. (Attachments: # 1 Exhibit 1 -- Proposed Order, # 2 Exhibit 2-- Complaint)(Bledsoe, Gary) (Entered: 07/19/2011)
07/19/2011	61	MOTION to Intervene by Eddie Bernice Johnson, Sheila Jackson-Lee, Alexander Green. (Attachments: # 1 Exhibit 1-- Proposed Order, # 2 Exhibit 2-- Complaint)(Bledsoe, Gary) (Entered: 07/19/2011)
07/21/2011	63	ORDER of Consolidation - consolidating this case with SA-11-CA-361, SA-11-CA-490 and SA-11-CA-592. Signed by Judge Orlando L. Garcia. (ga) (Entered: 07/22/2011)
07/22/2011	64	MOTION Amended Motion to Intervene of the Texas State Conference of NAACP Branches, Howard Jefferson, Juanita Wallace, and Rev. Bill Lawson by Howard Jefferson, Bill Lawson, Texas State Conference of NAACP Branches, Juanita Wallace. (Attachments: # 1

		Exhibit 1--Amended Proposed Order, # 2 Exhibit 2--Amended Complaint)(Bledsoe, Gary) (Entered: 07/22/2011)
07/25/2011	68	SECOND AMENDED COMPLAINT against Hope Andrade, Rick Perry filed by Texas Latino Redistricting Task Force, Alex Jimenez, Emelda Menendez, Tomacita Olivares, Alejandro Ortiz, Joey Cardenas, Rebecca Ortiz, Jose Olivares, Armando Cortez, Socorro Ramos, Gregorio Benito Palomino, Florinda Chavez, Cynthia Valadez, Cesar Eduardo Yevenes, Sergio Coronado, Gilberto Torres, Renato De Los Santos.(tm) (Entered: 07/26/2011)
07/25/2011	69	PLAINTIFF-INTERVENORS' AMENDED COMPLAINT against Hope Andrade, David Dewhurst, Rick Perry, State of Texas, Joe Straus amending, filed by Bill Lawson, Juanita Wallace, Texas State Conference of NAACP Branches, Howard Jefferson.(tm) (Entered: 07/26/2011)
07/25/2011	70	Intervenor COMPLAINT, filed by Texas Legislative Black Caucus

		against State of Texas, Rick Perry, David Dewhurst, Joe Strauss, Hope Andrade.(tm) (Entered: 07/26/2011)
07/25/2011	71	Intervenor COMPLAINT, filed by Alexander Green, Sheila Jackson-Lee, Eddie Bernice Johnson against State of Texas, Rick Perry, David Dewhurst, Joe Strauss, Hope Andrade.(tm) (Entered: 07/26/2011)
07/26/2011	72	CONSOLIDATION AND SCHEDULING ORDER: Member case SA-11-CV-615 consolidated with LEAD CASE SA-11-CA-360. For parties in Morris claim only deadline for Rule 26(f) conference is 7/29/11 and deadline for initial disclosures and motions to amend or supplement pleadings or join additional parties is 8/1/11. All other deadlines in the current scheduling order 51, 66 shall govern. Signed by Judge Orlando L. Garcia. (tm) (Entered: 07/27/2011)
07/27/2011	75	State Defendants' ANSWER to Complaint by LULAC Plaintiff-Intervenor by David Dewhurst, Rick Perry, State of Texas, Joe

		Straus. (Schenck, David) Modified on 7/28/2011, to correct filers (rf). (Entered: 07/27/2011)
07/27/2011	76	CONSOLIDATION AND SCHEDULING ORDER - consolidating this case with SA-11-CA-635 (Amended Pleadings and Joinder of Parties due by 8/1/2011, Discovery due by 8/17/2011, Dispositive Motions due by 8/17/2011, Pretrial Conference set for 9/2/2011 9:30 AM before Judge Orlando L. Garcia, Bench Trial set for 9/6/2011 9:30 AM before Judge Orlando L. Garcia.) Signed by Judge Orlando L. Garcia. (ga) (Entered: 07/27/2011)
07/27/2011	78	AMENDED THIRD PARTY COMPLAINT against Rick Perry, State of Texase amending, filed by LULAC. (Vera, Luis) Modified on 7/28/2011, to edit text (rf). (Entered: 07/27/2011)
08/02/2011	105	FIRST AMENDED COMPLAINT against Hope Andrade, Rick Perry, filed by Lyman King, Margarita V Quesada, Jane Hamilton, Romeo Munoz, John Jenkins, Marc Veasey, Jamaal R. Smith, Debbie Allen, Sandra Puente, Kathleen

		Maria Shaw. (tm) (Entered: 08/02/2011)
08/02/2011	110	ANSWER to 50 Amended Complaint by David Dewhurst, Rick Perry, State of Texas, Joe Straus. (Schenck, David) Modified on 8/3/2011, to remove filer (rf). (Entered: 08/02/2011)
08/02/2011	111	NOTICE of Voluntary Dismissal by Texas Legislative Black Caucus (Bledsoe, Gary) (Entered: 08/02/2011)
08/08/2011	131	ANSWER to 53 Amended Complaint, Third by Hope Andrade, David Dewhurst, Rick Perry, State of Texas, Joe Straus. (Schenck, David) (Entered: 08/08/2011)
08/08/2011	132	ANSWER to 68 Amended Complaint, Second by Hope Andrade, Rick Perry. (Schenck, David) (Entered: 08/08/2011)
08/08/2011	133	ANSWER to Complaint First Amended (1:11cv451-LY-JES-OLG; Document No. 23) by Hope Andrade, David Dewhurst, Rick Perry, State of Texas, Joe Straus. (Schenck, David) (Entered: 08/08/2011)

08/10/2011	167	ANSWER to Complaint (Cross) of Texas Democratic Party and Boyd Richie by Hope Andrade, Rick Perry. (Schenck, David) (Entered: 08/10/2011)
08/11/2011	187	ORDER DENYING 127 Motion to Stay Case. Signed by Judge Orlando L. Garcia. (tm) (Entered: 08/11/2011)
08/11/2011	188	ANSWER to 78 Amended Third Party Complaint by Hope Andrade, David Dewhurst, Rick Perry, State of Texas, Joe Straus. (Schenck, David) (Entered: 08/11/2011)
08/15/2011	192	ANSWER to Complaint Amended (SA-11-CA-615-OLG-JES-XR, Doc. 7 - 6/27/2011) by Hope Andrade, David Dewhurst, Rick Perry, State of Texas, Joe Straus. (Schenck, David) (Entered: 08/15/2011)
08/15/2011	193	ANSWER to 71 Intervenor Complaint by Hope Andrade, David Dewhurst, Rick Perry, State of Texas, Joe Straus. (Schenck, David) (Entered: 08/15/2011)
08/15/2011	194	ANSWER to 69 Amended Complaint by Hope Andrade,

		David Dewhurst, Rick Perry, State of Texas, Joe Straus. (Schenck, David) (Entered: 08/15/2011)
08/15/2011	195	ANSWER to 105 Amended Complaint by Hope Andrade, Rick Perry. (Schenck, David) (Entered: 08/15/2011)
08/17/2011	209	MOTION to Dismiss for Lack of Jurisdiction and, in the Alternative, Motion for Judgment on the Pleadings by Hope Andrade, David Dewhurst, Rick Perry, State of Texas, Joe Straus. (Attachments: # 1 Proposed Order, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F, # 8 Exhibit G, # 9 Exhibit H, # 10 Exhibit I, # 11 Exhibit J) (Schenck, David). Added MOTION for Judgment on the Pleadings on 8/18/2011 (rf). (Entered: 08/17/2011)
08/17/2011	210	MOTION for Partial Summary Judgment and Supporting Memorandum of Law by Hope Andrade, David Dewhurst, Rick Perry, State of Texas, Joe Straus. (Attachments: # 1 Proposed Order, # 2 Proposed Order, # 3

		Proposed Order) (Schenck, David) (Entered: 08/17/2011)
08/22/2011	222	COMPLAINT in Intervention (Filing fee $ 350 receipt number 0542-3876435). No Summons requested at this time, filed by US Congressman Henry Cuellar. (Rios, Rolando) (Entered: 08/22/2011)
08/31/2011	275	ORDER GRANTING IN PART on the Fifteenth Amendment claims, and such claims are DISMISSED as a matter of law. The motion is otherwise DENIED, and the remaining claims shall proceed to trial 210 Motion for Partial Summary Judgment. Signed by Judge Orlando L. Garcia. (rg) (Entered: 08/31/2011)
09/02/2011	283	Minute Entry for proceedings held before Judge Orlando L. Garcia: Pretrial Conference held on 9/1/2011 (Minute entry documents are not available electronically.). (Court Reporter Karl Myers.) (tm) (Entered: 09/02/2011)
09/02/2011	285	ORDER GRANTING IN PART AND DENYING IN PART 209 Motion to Dismiss for Lack of Jurisdiction, and in the

		alternative, Motion for Judgment on the Pleadings. Signed by Judge Orlando L. Garcia. (tm) (Entered: 09/02/2011)
09/06/2011	290	ANSWER to Complaint by Rick Perry, State of Texas. (Schenck, David) (Entered: 09/06/2011)
09/06/2011	294	Minute Entry for proceedings held before Judge Orlando L. Garcia, Judge Jerry E. Smith, Judge Xavier Rodriguez: Bench Trial begun on 9/6/2011 (Minute entry documents are not available electronically.), Bench Trial held on 9/6/2011 (Minute entry documents are not available electronically.). (Court Reporter Karl Myers, Chris Poage, Jerry Anderson.) (tm) (Entered: 09/07/2011)
09/07/2011	297	Minute Entry for proceedings held before Judge Orlando L. Garcia, Xavier Rodriguez, Jerry E. Smith: Bench Trial held on 9/7/2011 (Minute entry documents are not available electronically.). (Court Reporter Chris Poage, Karl Meyers, Jerry Anderson.) (tm) Modified on 9/8/2011 to add additional Judge information (tm). (Entered: 09/08/2011)

09/08/2011	299	Minute Entry for proceedings held before Judge Orlando L. Garcia, Judge Xavier Rodriguez, Judge Jerry E. Smith: Bench Trial held on 9/8/2011 (Minute entry documents are not available electronically.). (Court Reporter Chris Poage, Karl Meyers, Jerry Anderson.)(tm) (Entered: 09/09/2011)
09/09/2011	301	Minute Entry for proceedings held before Judge Orlando L. Garcia, Judge Jerry E. Smith, Judge Xavier Rodriguez: Bench Trial held on 9/9/2011 (Minute entry documents are not available electronically.). (Court Reporter Karl Myers, Chris Anderson.)(tm) (Entered: 09/09/2011)
09/10/2011	302	STIPULATION *OF FACTS* by Debbie Allen, Nancy Hall, Jane Hamilton, John Jenkins, Lyman King, Romeo Munoz, Sandra Puente, Margarita V Quesada, Kathleen Maria Shaw, Jamaal R. Smith, State of Texas, Marc Veasey. (Hebert, J.) (Entered: 09/10/2011)
09/10/2011	305	Minute Entry for proceedings held before Judge Orlando L. Garcia, Judge Jerry E. Smith and Judge

		Xavier Rodriguez: Bench Trial held on 9/10/2011 (Minute entry documents are not available electronically.). (Court Reporter Karl Meyers, Jerry Anderson.)(tm) (Entered: 09/12/2011)
09/12/2011	309	Minute Entry for proceedings held before Judge Orlando L. Garcia, Judge Jerry E. Smith, Judge Xavier Rodriguez: Bench Trial held on 9/12/2011 (Minute entry documents are not available electronically.). (Court Reporter Karl Myers, Chris Poage, Jerry Anderson.)(rf) (Entered: 09/13/2011)
09/13/2011	310	Minute Entry for proceedings held before Judge Orlando L. Garcia, Judge Jerry E. Smith, Judge Xavier Rodriguez: Bench Trial held on 9/13/2011 (Minute entry documents are not available electronically.). (Court Reporter Karl Meyers, Jerry Anderson.)(tm) (Entered: 09/13/2011)
09/14/2011	311	Minute Entry for proceedings held before Judge Orlando L. Garcia, Judge Jerry E. Smith, Judge Xavier Rodriguez: Bench Trial

		held on 9/14/2011 (Minute entry documents are not available electronically.). (Court Reporter Chris Poage, Karl Meyers.)(tm) (Entered: 09/14/2011)
09/15/2011	332	Minute Entry for proceedings held before Judge Orlando L. Garcia, Judge Jerry E. Smith, Judge Xavier Rodriguez: Bench Trial held on 9/15/2011 (Minute entry documents are not available electronically.). (Court Reporter Chris Poage and Karl Myers.)(tm) (Entered: 09/16/2011)
09/16/2011	336	Minute Entry for proceedings held before Judge Orlando L. Garcia, Judge Jerry Smith, Judge Xavier Rodriguez: Bench Trial completed on 9/16/2011 (Minute entry documents are not available electronically.) All Offers of Proof and Declarations submitted by Plaintiffs are due no later than Monday, September 19, 2011. Simultaneous trial briefs due by 6:00 p.m. on Friday, October 7, 2011. Simultaneous replies due by 6:00 p.m. on Friday, October 21, 2011. (Court Reporter Chris Poage, Karl Meyers, Jerry Anderson.)(tm) Modified judge

		information on 9/19/2011 (tm). (Entered: 09/19/2011)
09/20/2011	358	ADVISORY TO THE COURT by Mexican American Legislative Caucus, Texas House of Representatives *regarding section 5 proceedings*. (Attachments: # 1 Exhibit)(Garza, Jose) (Entered: 09/20/2011)
09/27/2011	375	MOTION for Temporary Restraining Order by Mexican American Legislative Caucus, Texas House of Representatives. (Attachments: # 1 Exhibit declaration of Joaquin G. Avila, # 2 Exhibit exhibit 1 to declaration, # 3 Exhibit exhibit 2 to declaration, # 4 Exhibit exhibit 3 to declaration, # 5 Proposed Order) (Garza, Jose) (Entered: 09/27/2011)
09/29/2011	380	ORDER ENJOINING THE IMPLEMENTATION OF VOTING CHANGES: GRANTING 375 Motion for TRO. Signed by Judge Orlando L. Garcia. (tm) (Entered: 09/29/2011)
10/04/2011	391	AMENDED ORDER implementing schedule to run simultaneously with any other deadlines in this case, with the

		goal of implementing an interim plan in the event it becomes necessary. Signed by Judge Orlando L. Garcia. (tm) (Entered: 10/04/2011)
10/07/2011	405	ADVISORY TO THE COURT by Hope Andrade, Rick Perry, State of Texas *REGARDING INTERIM REAPPORTIONMENT.* (Schenck, David) (Entered: 10/07/2011)
10/11/2011	418	ORDER regarding appointment of technical advisors to the Court. Signed by Judge Orlando L. Garcia. (rf) (Entered: 10/11/2011)
10/21/2011	455	BRIEF regarding 411 Trial Brief by Dorothy DeBose, Harold Dutton, Jr, Nancy Hall, Rudolfo Ortiz, Shannon Perez, Carmen Rodriguez, Sergio Salinas, Gregory Tamez Reply Brief. (Attachments: # 1 Exhibit) (Richards, David) (Entered: 10/21/2011)
10/21/2011	456	TRIAL BRIEF Reply to Defendants' Trial Brief 411 by Alexander Green, Sheila Jackson-Lee, Howard Jefferson, Eddie Bernice Johnson, Bill Lawson, Texas State Conference of

		NAACP Branches, Juanita Wallace. (Riggs, Allison) (Entered: 10/21/2011)
10/21/2011	457	RESPONSE to Plaintiffs' Post-Trial Briefs by Hope Andrade, Rick Perry, State of Texas. (Schenck, David) (Entered: 10/21/2011)
10/21/2011	459	BRIEF by Mexican American Legislative Caucus, Texas House of Representatives Reply to State's Post Trial Brief. (Garza, Jose) (Entered: 10/21/2011)
10/22/2011	460	RESPONSE in Opposition to 411 Trial Brief by Joey Cardenas, Florinda Chavez, Sergio Coronado, Armando Cortez, Renato De Los Santos, Alex Jimenez, Emelda Menendez, Jose Olivares, Tomacita Olivares, Alejandro Ortiz, Rebecca Ortiz, Gregorio Benito Palomino, Socorro Ramos, Texas Latino Redistricting Task Force, Gilberto Torres, Cynthia Valadez, Cesar Eduardo Yevenes. (Couto, Rebecca) (Entered: 10/22/2011)
10/28/2011	475	ADVISORY TO THE COURT by OF AMERICA UNITED STATES regarding Statement of Interest Under Section 5 of the

		Voting Rights Act of 1965. (Attachments: # 1 Exhibit Memorandum of Points and Authorities in Support of its Opposition to Plaintiff's Motion for Summary Judgment, # 2 Exhibit Statement of Genuine Issues) (Sitton, Jaye) (Entered: 10/28/2011)
10/31/2011	479	Minute Entry for proceedings held before Judge Orlando L. Garcia, Jerry E. Smith, Xavier Rodriguez: Three-Judge Court Hearing held on 10/31/2011 (Minute entry documents are not available electronically.). (Court Reporter Karl Myers, Chris Poage.)(rf) (Entered: 11/01/2011)
11/03/2011	485	Minute Entry for proceedings held before Judge Orlando L. Garcia: Hearing on Interim Plans held on 11/3/2011. (Minute entry documents are not available electronically.). (Court Reporter Karl Myers, Chris Poage.)(rg) (Entered: 11/04/2011)
11/04/2011	486	ORDERED that for the 2012 elections to the Texas House of Representatives and Texas Senate a person must be a resident of the district the person seeks to

		represent from December 15, 2011 until the date of the General Election, and it is, It is further ORDERED that an incorrect precinct designation on an application for a place on the ballot shall not render the application invalid if the designation is corrected on or before December 19, 2011. An application for a place on the ballot for the office of precinct chair shall not be invalid if filed more than 90 days before the end of the filing period. ORDERED that for the 2012 elections for federal, state, county and local officers shall proceed as required under state and federal law except as provided for above. The State of Texas through the Secretary of State shall deliver an exact duplicate of this order to all election officials and county chairs, to the extent possible, within three days. The order shall also be posted by the Secretary of State on its website and the official election calendar as posted on the Secretary of State's website shall be updated to reflect the terms of this order. The political parties shall deliver this order and notice thereof to county party chairs

		without delay. Signed by Judge Orlando L. Garcia. (rg) (Entered: 11/04/2011)
11/07/2011	489	AMENDED ORDER. This amendment to the Court's Order 486 dated 11/4/11, makes only one correction to the date contained in subsection l. Signed by Judge Orlando L. Garcia. (rf) Modified on 11/7/2011, to edit text (rf). (Entered: 11/07/2011)
11/07/2011	504	ADVISORY TO THE COURT by OF AMERICA UNITED STATES Statement of Interest of the United States With Respect to Section 2 of the Voting Rights Act. (Attachments: # 1 Exhibit, # 2 Exhibit)(Sitton, Jaye) (Entered: 11/07/2011)
11/08/2011	505	ADVISORY TO THE COURT by Mexican American Legislative Caucus, Texas House of Representatives Regarding DC District Court Order Denying State's Motion for Summary Judgment. (Attachments: # 1 Exhibit)(Garza, Jose) (Entered: 11/08/2011)
11/10/2011	508	ADVISORY TO THE COURT by Hope Andrade, Rick Perry, State of Texas *TO THE COURT*

		REGARDING DEVIATION FROM EQUALIZED DISTRICT *POPULATION IN INTERIM REDISTRICTING PLANS.* (Attachments: # 1 Exhibit) (Schenck, David) (Entered: 11/10/2011)
11/23/2011	526	ORDER The parties are ordered to access the proposed plans and file any comments and/or objections by noon on Friday, 11/25/11. Signed by Judge Orlando L. Garcia. (rf) (Entered: 11/23/2011)
11/23/2011	528	ORDER regarding interim plan for the districts used to elect members in 2012 to the Texas House of Representatives. Signed by Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith, Judge Xavier Rodriguez. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(rf) (Entered: 11/23/2011)
11/25/2011	543	ORDER DENYING 529 Opposed MOTION to Stay Implementation of Interim House Redistricting Plan filed by Hope Andrade, State of Texas, Rick Perry.Signed by

		Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith, Judge Xavier Rodriguez. (mo,) (Entered: 11/25/2011)
11/26/2011	544	ORDER adopting PLAN C220 as the interim plan for the districts used to elect members in 2012 to the United States House of Representatives. Signed by Judge Orlando L. Garcia. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(mo,) (Entered: 11/26/2011)
11/27/2011	546	ORDER DENYING 545 Motion to Stay implementation of the court-drawn interim congressional redistricting plan pending appeal. Signed by Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith, and Judge Xavier Rodriguez. (mo,) (Entered: 11/27/2011)
11/27/2011	547	Appeal of Order entered by District Judge 528 by Hope Andrade, Rick Perry, State of Texas. No filing fee submitted (Schenck, David) (Entered: 11/27/2011)
11/29/2011	548	Amended Appeal of Order entered by District Judge 543, 546 by Hope Andrade, Rick Perry, State

		of Texas. *Amended Notice of Appeal* No filing fee submitted (Schenck, David) (Entered: 11/29/2011)
12/02/2011	549	Supplemental Opinion Signed by Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith, and Judge Xavier Rodriguez. (mo,) Modified on 12/2/2011 (mo,). (Entered: 12/02/2011)
12/13/2011	556	Minute Entry for proceedings held before Judge Orlando L. Garcia: Status Conference held on 12/13/2011 (Minute entry documents are not available electronically.). (Court Reporter Karl Myers & Chris Poage.)(rf) (Entered: 12/14/2011)
12/14/2011	558	ORDER modifying the residence requirements (Miscellaneous Hearing set for 1/12/2012 10:00 AM before Judge Orlando L. Garcia.). Signed by Judge Orlando L. Garcia. Circuit Judge Jerry E. Smith, Judge Xavier Rodriguez. (rf) (Entered: 12/14/2011)
12/16/2011	561	Letter from Supreme Court of the United States dated 12/9/11. (rf) (Entered: 12/16/2011)

12/16/2011	562	ORDER of Supreme Court of the United States re 547 Notice of Appeal filed by Hope Andrade, State of Texas, Rick Perry, 548 Notice of Appeal filed by Hope Andrade, State of Texas, Rick Perry. (rf) (Entered: 12/16/2011)
12/16/2011	563	ORDER schedule contingent upon this Court entering redistricting plans for the Texas House, Senate and Congress on or before 2/1/12. Signed by Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith, Judge Xavier Rodriguez. (rf) Modified on 12/16/2011, to add Judges (rf). (Entered: 12/16/2011)
01/20/2012	575	Supreme Court JUDGMENT/OPINION Remanding 548 Notice of Appeal, 547 Notice of Appeal. (rf) (Entered: 01/20/2012)
01/24/2012	586	MOTION to Intervene by Joe Barton. (rf) (Entered: 01/24/2012)
01/24/2012		Text Order GRANTING 586 Motion to Intervene entered by Judge Orlando L. Garcia. (This is a text-only entry generated by the court. There is no document

		associated with this entry.) (jp) (Entered: 01/24/2012)
01/25/2012	589	MOTION to Intervene by Francisco Canseco. (Attachments: # 1 Proposed Order)(kh,) (Entered: 01/25/2012)
01/25/2012		Text Order GRANTING 589 Motion to Intervene by Congressman Francisco Canseco entered by Judge Orlando L. Garcia. (This is a text-only entry generated by the court. There is no document associated with this entry.) (jp) (Entered: 01/25/2012)
01/27/2012	591	ADVISORY TO THE COURT by United States of America *Statement of Interest of the United States with Respect to the Redrawing of Interim Maps on the Basis of Probable Violations of Section 5 of the Voting Rights Act.* (Sitton, Jaye) (Entered: 01/27/2012)
01/27/2012	592	ADVISORY TO THE COURT by United States of America *Statement of Interest of the United States under the Uniformed and Overseas Citizens Absentee Voting Act.* (Sitton, Jaye) (Entered: 01/27/2012)

01/28/2012	593	ORDER notifying parties of February 6th, 2012 deadline for submission of an agreed-upon interim map for the Court's consideration. Signed by Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith, Judge Xavier Rodriguez. (mo,) (Entered: 01/28/2012)
01/27/2012	594	Minute Entry for proceedings held before Judge Orlando L. Garcia, Judge Jerry E. Smith, Judge Xavier Rodriguez: Status Conference held on 1/27/2012 (Minute entry documents are not available electronically.). (Court Reporter Karl Meyers/ Chris Poage.)(tm) (Entered: 01/30/2012)
02/02/2012	597	ADVISORY TO THE COURT by Debbie Allen, Nancy Hall, Jane Hamilton, John Jenkins, Lyman King, Romeo Munoz, Sandra Puente, Margarita V Quesada, Kathleen Maria Shaw, Jamaal R. Smith, Marc Veasey *of Filing Trial Transcripts from Texas v. U.S. (D.D.C.)*. (Attachments: # 1 Exhibit Trial Transcript 1.17am, # 2 Exhibit Trial Transcript 1.17pm, # 3 Exhibit Trial Transcript 1.18am,

		# 4 Exhibit Trial Transcript 1.19am, # 5 Exhibit Trial Transcript 1.19pm, # 6 Exhibit Trial Transcript 1.20am, # 7 Exhibit Trial Transcript 1.20pm, # 8 Exhibit Trial Transcript 1.23am, # 9 Exhibit Trial Transcript 1.23pm, # 10 Exhibit Trial Transcript 1.24am, # 11 Exhibit Trial Transcript 1.24pm, # 12 Exhibit Trial Transcript 1.25am, # 13 Exhibit Trial Transcript 1.25pm, # 14 Exhibit Trial Transcript 1.26am, # 15 Exhibit Closing argument transcript 1.31am, # 16 Exhibit Closing argument 1.31 pm)(Hebert, J.) (Entered: 02/02/2012)
02/02/2012	598	ORDERED that in addition to the issues the parties have already beenordered to address in briefs or written advisories, the parties shall submit briefs and proposed findings of fact and conclusions law that the Court may utilize in preparing interim redistricting plans no later than 6:00 p.m. on February 10, 2012. Further ORDERED that oral argument on all issues relating to interim plans is set for 2/15/2012 08:00 AM which

		will include a status conference. Signed by Judge Orlando L. Garcia. (tm) (Entered: 02/02/2012)
02/02/2012	599	ADVISORY TO THE COURT by Debbie Allen, Nancy Hall, Jane Hamilton, John Jenkins, Lyman King, Romeo Munoz, Sandra Puente, Margarita V Quesada, Kathleen Maria Shaw, Jamaal R. Smith, Marc Veasey *Supplemental Advisory Regarding Filing of Trial Transcript.* (Attachments: # 1 Exhibit Trial Transcript 1/19 a.m. session)(Hebert, J.) (Entered: 02/02/2012)
02/03/2012	601	ADVISORY TO THE COURT by Dorothy DeBose, Nancy Hall, Rudolfo Ortiz, Shannon Perez, Carmen Rodriguez, Sergio Salinas, Gregory Tamez *Regarding Interim Plans.* (Richards, David) (Entered: 02/03/2012)
02/03/2012	602	Complaint in Intervention filed by Congressman Joe Barton's against State of Texas by Joe Barton (Trainor, James) Modified on 2/3/2012 to edit docket text (tm). (Entered: 02/03/2012)
02/06/2012	603	ADVISORY TO THE COURT by Debbie Allen, Eliza Alvarado,

		Nina Jo Baker, City of Austin, Bruce Elfant, David Gonzalez, Alexander Green, Nancy Hall, Jane Hamilton, Sheila Jackson-Lee, Howard Jefferson, John Jenkins, Eddie Bernice Johnson, Lyman King, LULAC, Bill Lawson, Betty F Lopez, Josey Martinez, Romeo Munoz, Balakumar Pandian, Sandra Puente, Margarita V Quesada, Eddie Rodriguez, Beatrice Saloma, Alex Serna, Sandra Serna, Kathleen Maria Shaw, Jamaal R. Smith, Lionor Sorola-Pohlman, Texas State Conference of NAACP Branches, Travis County, Juanita Valdez-Cox, Marc Veasey, Juanita Wallace, Milton Gerard Washington. (Hicks, Max) (Entered: 02/06/2012)
02/06/2012	604	ORDER: The parties should continue their negotiations to the extent possible, but all deadlines remain in place unless or until the Court is notified that an agreement has been reached. Signed by Judge Orlando L. Garcia. (tm) (Entered: 02/06/2012)
02/06/2012	605	ADVISORY TO THE COURT by Hope Andrade, Rick Perry, State of Texas *Regarding Interim*

		Redistricting Plans. (Mattax, David) (Entered: 02/06/2012)
02/06/2012	606	ADVISORY TO THE COURT by Texas Latino Redistricting Task Force *Regarding New Proposed Plans and Identification of Issues.* (Lyznik, Karolina) (Entered: 02/06/2012)
02/06/2012	607	NOTICE *advisory on status of interim plan* by Mexican American Legislative Caucus, Texas House of Representatives (Garza, Jose) (Entered: 02/06/2012)
02/07/2012	609	ADVISORY TO THE COURT by Joe Barton *Corrected.* (Attachments: # 1 Exhibit A)(Nixon, Joseph) (Entered: 02/07/2012)
02/07/2012	610	ADVISORY TO THE COURT by US Congressman Henry Cuellar *Advisory on Congressional Plan C 226.* (Rios, Rolando) (Entered: 02/07/2012)
02/08/2012	611	ADVISORY TO THE COURT by Hope Andrade, Rick Perry, State of Texas *Correcting Previous Advisory Regarding Interim Redistricting Plans.* (Frederick, Matthew) (Entered: 02/08/2012)

02/08/2012	612	ORDER, (Status Conference reset for 2/14/2012 09:00 AM.). Signed by Judge Orlando L. Garcia. (tm) (Entered: 02/09/2012)
02/09/2012	613	ADVISORY TO THE COURT by US Congressman Henry Cuellar *Supplement Advisory on Interim Plan.* (Rios, Rolando) (Entered: 02/09/2012)
02/09/2012	614	ADVISORY TO THE COURT by Dorothy DeBose, Nancy Hall, Rudolfo Ortiz, Shannon Perez, Carmen Rodriguez, Sergio Salinas, Gregory Tamez *Regarding Purported Settlement.* (Richards, David) (Entered: 02/09/2012)
02/09/2012	615	NOTICE of Filing *Exhibit List from Texas v. US* by United States of America (Attachments: # 1 Amended Exhibit List)(Sitton, Jaye) (Entered: 02/09/2012)
02/10/2012		Received disc containing the final amended exhibit list, compiled jointly for the defendant and defendant-intervenors by the United States. (See dkt no. 615). ***Only one disc received therefore it was forwarded to courtroom deputy for keeping. (tm) (Entered: 02/10/2012)

02/10/2012	616	ORDER re: Hearing set for 2/14/12. Signed by Judge Orlando L. Garcia. (rf) (Entered: 02/10/2012)
02/10/2012	617	Proposed Findings of Fact by Dorothy DeBose, Nancy Hall, Rudolfo Ortiz, Shannon Perez, Carmen Rodriguez, Sergio Salinas, Gregory Tamez. (Attachments: # 1 Exhibit)(Richards, David) (Entered: 02/10/2012)
02/10/2012	618	Proposed Findings of Fact by Dorothy DeBose, Nancy Hall, Rudolfo Ortiz, Shannon Perez, Carmen Rodriguez, Sergio Salinas, Gregory Tamez *Proposed Conclusions of Law*. (Richards, David) (Entered: 02/10/2012)
02/10/2012	619	TRIAL BRIEF *Regarding Interim Plans* by Dorothy DeBose, Nancy Hall, Rudolfo Ortiz, Shannon Perez, Carmen Rodriguez, Sergio Salinas, Gregory Tamez. (Richards, David) (Entered: 02/10/2012)
02/10/2012	620	Proposed Findings of Fact by Mexican American Legislative Caucus, Texas House of Representatives. (Garza, Jose) (Entered: 02/10/2012)

02/10/2012	621	BRIEF by Joe Barton *on Interim Congressional Plan.* (Trainor, James) (Entered: 02/10/2012)
02/10/2012	622	TRIAL BRIEF *interim plan issues* by Mexican American Legislative Caucus, Texas House of Representatives. (Garza, Jose) (Entered: 02/10/2012)
02/10/2012	623	TRIAL BRIEF by Debbie Allen, Eliza Alvarado, Nina Jo Baker, City of Austin, Bruce Elfant, David Gonzalez, Alexander Green, Nancy Hall, Jane Hamilton, Sheila Jackson-Lee, Howard Jefferson, John Jenkins, Eddie Bernice Johnson, Lyman King, LULAC, Bill Lawson, Betty F Lopez, Josey Martinez, Romeo Munoz, Balakumar Pandian, Sandra Puente, Margarita V Quesada, Eddie Rodriguez, Beatrice Saloma, Alex Serna, Sandra Serna, Kathleen Maria Shaw, Jamaal R. Smith, Lionor Sorola-Pohlman, Texas Legislative Black Caucus, Texas State Conference of NAACP Branches, Travis County, Juanita Valdez-Cox, Marc Veasey, Juanita Wallace, Milton Gerard Washington. (Hicks, Max) (Entered: 02/10/2012)

02/10/2012	624	Proposed Findings of Fact by Eliza Alvarado, Nina Jo Baker, City of Austin, Bruce Elfant, David Gonzalez, LULAC, Betty F Lopez, Josey Martinez, Balakumar Pandian, Eddie Rodriguez, Beatrice Saloma, Alex Serna, Sandra Serna, Lionor Sorola-Pohlman, Travis County, Juanita Valdez-Cox, Milton Gerard Washington. (Hicks, Max) (Entered: 02/10/2012)
02/10/2012	625	TRIAL BRIEF *on Interim Maps* by Howard Jefferson, Bill Lawson, Texas State Conference of NAACP Branches, Juanita Wallace. (Notzon, Robert) (Entered: 02/10/2012)
02/10/2012	627	Proposed Findings of Fact by Hope Andrade, Rick Perry, State of Texas. (Frederick, Matthew) (Entered: 02/10/2012)
02/10/2012	629	TRIAL BRIEF *on interim congressional plan CORRECTED* by Francisco Canseco. (Gober, Christopher) (Entered: 02/10/2012)
02/10/2012	630	NOTICE *of Statement of Interest* by United States of America (Attachments: # 1 Exhibit US Post-Trial Br.,

		# 2 Exhibit US Proposed Findings, # 3 Exhibit Jan. 31 Transcript, # 4 Exhibit Jan. 25 Transcript, # 5Exhibit Request for Judicial Notice)(Freeman, Daniel) (Entered: 02/10/2012)
02/10/2012	631	BRIEF by Hope Andrade, Rick Perry, State of Texas *on Issues Relating to Interim Redistricting Plans.* (Mattax, David) (Entered: 02/10/2012)
02/10/2012	632	MOTION for Leave to File Amicus Brief */to Participate as Amicus Curiae* by United States of America. (Attachments: # 1 Proposed Order)(Freeman, Daniel) (Entered: 02/10/2012)
02/10/2012	634	Proposed Findings of Fact by Texas Latino Redistricting Task Force *and Conclusions of Law.* (Lyznik, Karolina) (Entered: 02/10/2012)
02/10/2012	635	Proposed Findings of Fact by Alexander Green, Sheila Jackson-Lee, Howard Jefferson, Eddie Bernice Johnson, Bill Lawson, Texas Legislative Black Caucus, Texas State Conference of NAACP Branches, Juanita Wallace *Re: Interim Maps.*

		(Notzon, Robert) (Entered: 02/10/2012)
02/10/2012	636	ADVISORY TO THE COURT by Alexander Green, Sheila Jackson-Lee, Howard Jefferson, Eddie Bernice Johnson, Bill Lawson, Texas Legislative Black Caucus, Texas State Conference of NAACP Branches, Juanita Wallace *2nd CORRECTED re: Interim maps.* (Attachments: # 1 Exhibit proposed map, # 2 Exhibit proposed map, # 3 Exhibit proposed map, # 4 Exhibit proposed map, # 5 Exhibit change description, # 6 Exhibit change description, # 7 Exhibit proposed map pic, # 8 Exhibit proposed map pic, # 9 Exhibit proposed map pic, # 10 Exhibit proposed map pic)(Notzon, Robert) (Entered: 02/10/2012)
02/10/2012	637	Proposed Findings of Fact by Joey Cardenas, Florinda Chavez, City of Austin, Sergio Coronado, Armando Cortez, Renato De Los Santos, Dorothy DeBose, Nancy Hall, Emelda Menendez, Mexican American Legislative Caucus, Texas House of Representatives, Jose Olivares, Tomacita Olivares,

		Alejandro Ortiz, Rebecca Ortiz, Rudolfo Ortiz, Gregorio Benito Palomino, Shannon Perez, Margarita V Quesada, Socorro Ramos, Carmen Rodriguez, Eddie Rodriguez, Sergio Salinas, Texas Latino Redistricting Task Force, Gilberto Torres, Travis County, Cynthia Valadez, Cesar Eduardo Yevenes. (Attachments: # 1Exhibit 1 - Consents)(Perales, Nina) (Entered: 02/10/2012)
02/10/2012	638	BRIEF by Joey Cardenas, Florinda Chavez, Sergio Coronado, Armando Cortez, Renato De Los Santos, Alex Jimenez, Jose Olivares, Tomacita Olivares, Alejandro Ortiz, Rebecca Ortiz, Rudolfo Ortiz, Gregorio Benito Palomino, Socorro Ramos, Texas Latino Redistricting Task Force, Gilberto Torres, Cynthia Valadez, Cesar Eduardo Yevenes. (Attachments: # 1 Exhibit Index to Appendix, # 2 Exhibit A, # 3Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F, # 8 Exhibit G, # 9 Exhibit H, # 10 Exhibit I, # 11 Exhibit J, # 12 Exhibit K, # 13 Exhibit L, # 14 Exhibit M, # 15 Exhibit N, # 16 Exhibit O,

		# 17 Exhibit P1, # 18 Exhibit P2, # 19 Exhibit P3, # 20 Exhibit P4, # 21 Exhibit P5, # 22 Exhibit P6, # 23 Exhibit P7, # 24 Exhibit P8, # 25 Exhibit P9, # 26 Exhibit P10, # 27 Exhibit P11, # 28 Exhibit P12, # 29 Exhibit P13, # 30 Exhibit Q1, # 31 Exhibit Q2, # 32 Exhibit Q3, # 33 Exhibit Q4, # 34 Exhibit Q5, # 35 Exhibit Q6, # 36 Exhibit Q7, # 37 Exhibit Q8, # 38 Exhibit Q9, # 39 Exhibit R, # 40 Exhibit S)(Perales, Nina) (Entered: 02/10/2012)
02/12/2012	640	ADVISORY TO THE COURT by Debbie Allen, Eliza Alvarado, Nina Jo Baker, City of Austin, Bruce Elfant, David Gonzalez, Jane Hamilton, John Jenkins, Lyman King, Betty F Lopez, Josey Martinez, Romeo Munoz, Balakumar Pandian, Sandra Puente, Margarita V Quesada, Eddie Rodriguez, Beatrice Saloma, Alex Serna, Sandra Serna, Kathleen Maria Shaw, Jamaal R. Smith, Lionor Sorola-Pohlman, Travis County, Juanita Valdez-Cox, Marc Veasey, Milton Gerard Washington *Joint Advisory*. (Hebert, J.) (Entered: 02/12/2012)

02/13/2012	641	ORDER re 630 Statement of Interest regarding interim maps filed by United States of America. A representative of the Department of Justice is invited, but is not required, to participate in the hearings to be held in this case onFebruary 14 and 15, 2012. Plaintiff MALC's lead attorney, Jose Garza, is requested to forward this invitation as soon as possible to the appropriate DOJ attorney. Signed by Judge Orlando L. Garcia. (tm) (Entered: 02/13/2012)
02/13/2012	642	ADVISORY TO THE COURT by US Congressman Henry Cuellar *Second Advisory on Interim Plan*. (Rios, Rolando) (Entered: 02/13/2012)
02/13/2012	643	TRIAL BRIEF *Reply* by Dorothy DeBose, Nancy Hall, Rudolfo Ortiz, Shannon Perez, Carmen Rodriguez, Sergio Salinas, Gregory Tamez. (Attachments: # 1 Exhibit A)(Richards, David) (Entered: 02/13/2012)
02/13/2012	644	BRIEF by Debbie Allen, Eliza Alvarado, Nina Jo Baker, City of Austin, Bruce Elfant, David Gonzalez, Alexander Green, Nancy

		Hall, Jane Hamilton, Sheila Jackson-Lee, Howard Jefferson, John Jenkins, Eddie Bernice Johnson, Lyman King, LULAC, Bill Lawson, Betty F Lopez, Josey Martinez, Romeo Munoz, Balakumar Pandian, Sandra Puente, Margarita V Quesada, Eddie Rodriguez, Beatrice Saloma, Alex Serna, Sandra Serna, Kathleen Maria Shaw, Jamaal R. Smith, Lionor Sorola-Pohlman, Texas State Conference of NAACP Branches, Travis County, Juanita Valdez-Cox, Marc Veasey, Juanita Wallace, Milton Gerard Washington. (Hicks, Max) (Entered: 02/13/2012)
02/13/2012	645	RESPONSE *Brief on Issues Relating to Interim Redistricting Plans* by Hope Andrade, Rick Perry, State of Texas. (Mattax, David) (Entered: 02/13/2012)
02/13/2012	646	ADVISORY TO THE COURT by Hope Andrade, Rick Perry, State of Texas *Regarding Interim Maps*. (Mattax, David) (Entered: 02/13/2012)
02/13/2012	647	ADVISORY TO THE COURT by Alexander Green, Sheila Jackson-Lee, Howard Jefferson, Eddie

		Bernice Johnson, Bill Lawson, Texas State Conference of NAACP Branches, Juanita Wallace *re State's proposed C226.* (Attachments: # 1 Exhibit)(Notzon, Robert) (Entered: 02/13/2012)
02/14/2012	652	Minute Entry for proceedings held before Judge Orlando L. Garcia, Judge Xavier Rodriguez, Judge Jerry E. Smith: Status Conference held on 2/14/2012 (Minute entry documents are not available electronically.). (Court Reporter Karl Myers, Chris Poage.)(tm) (Entered: 02/15/2012)
02/15/2012	655	Minute Entry for proceedings held before Judge Orlando L. Garcia, Judge Xavier Rodriguez, Judge Jerry E. Smith: Status Conference held on 2/15/2012 (Minute entry documents are not available electronically.). (Court Reporter Karl Myers, Chris Poage.)(tm) (Entered: 02/16/2012)
02/16/2012	657	BRIEF by Joe Barton *on Creation of CD 33 in Plan C226.* (Trainor, James) (Entered: 02/16/2012)
02/16/2012	658	TRIAL BRIEF *Post Hearing Brief* by Dorothy DeBose, Nancy

		Hall, Rudolfo Ortiz, Shannon Perez, Carmen Rodriguez, Gregory Tamez. (Richards, David) (Entered: 02/16/2012)
02/16/2012	659	ADVISORY TO THE COURT by Debbie Allen, Eliza Alvarado, Nina Jo Baker, City of Austin, Bruce Elfant, David Gonzalez, Alexander Green, Nancy Hall, Jane Hamilton, Sheila Jackson-Lee, Howard Jefferson, John Jenkins, Eddie Bernice Johnson, Lyman King, LULAC, Bill Lawson, Betty F Lopez, Josey Martinez, Romeo Munoz, Balakumar Pandian, Sandra Puente, Margarita V Quesada, Eddie Rodriguez, Beatrice Saloma, Alex Serna, Sandra Serna, Kathleen Maria Shaw, Jamaal R. Smith, Lionor Sorola-Pohlman, Texas Legislative Black Caucus, Texas State Conference of NAACP Branches, Travis County, Juanita Valdez-Cox, Marc Veasey, Juanita Wallace, Milton Gerard Washington. (Hicks, Max) (Entered: 02/16/2012)
02/16/2012	660	ADVISORY TO THE COURT by Hope Andrade, Rick Perry, State of Texas *Joint Advisory Regarding Interim Congressional*

		Districts. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(Mattax, David) (Entered: 02/16/2012)
02/17/2012	663	ORDER the parties who support proposed plan H303 shall fle briefs by 2/21/12 at 2:00 pm. Signed by Judge Orlando L. Garcia. (rf) (Entered: 02/17/2012)
02/20/2012	664	ADVISORY TO THE COURT by Debbie Allen, Jane Hamilton, John Jenkins, Lyman King, Romeo Munoz, Sandra Puente, Margarita V Quesada, Kathleen Maria Shaw, Jamaal R. Smith, Marc Veasey *Regarding Quesada Plan C234*. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit)(Hebert, J.) (Entered: 02/20/2012)
02/20/2012	665	TRIAL BRIEF *post hearing brief* by Mexican American Legislative Caucus, Texas House of Representatives. (Garza, Jose) (Entered: 02/20/2012)
02/21/2012	666	ORDER Planitiff MALC (and any other interested Plaintiff) and the State of Texas shall submit

		briefing no later than noon Wednesday, February 22, 2012, on the issue of whether CD23 in Plan C226 is returned by benchmark performance. Signed by Judge Orlando L. Garcia. (rf) (Entered: 02/21/2012)
02/21/2012	667	RESPONSE *to February 17, 2012 Order* by Dorothy DeBose, Nancy Hall, Rudolfo Ortiz, Shannon Perez, Carmen Rodriguez, Sergio Salinas, Gregory Tamez. (Richards, David) (Entered: 02/21/2012)
02/21/2012	668	ADVISORY TO THE COURT by Hope Andrade, Rick Perry, State of Texas *Joint Advisory by State Defendants and Plaintiffs Texas Latino Redistricting Task Force, et al. Regarding Interim House Districts*. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G)(Mattax, David) (Entered: 02/21/2012)
02/21/2012	669	NOTICE of Filing Two DVDs – Trial Exhibit List and Trial Exhibits *in Texas v. United States* by Hope Andrade, Rick

		Perry, State of Texas (Mattax, David) (Entered: 02/21/2012)
02/21/2012	670	ADVISORY TO THE COURT by Mexican American Legislative Caucus, Texas House of Representatives *on plan H303 as per court order of Feb. 17.* (Garza, Jose) (Entered: 02/21/2012)
02/22/2012	671	ADVISORY TO THE COURT by Mexican American Legislative Caucus, Texas House of Representatives *on C226, CD 23.* (Garza, Jose) (Entered: 02/22/2012)
02/22/2012	672	ADVISORY TO THE COURT by Debbie Allen, Eliza Alvarado, Nina Jo Baker, City of Austin, Bruce Elfant, David Gonzalez, Alexander Green, Nancy Hall, Jane Hamilton, Sheila Jackson-Lee, Howard Jefferson, John Jenkins, Eddie Bernice Johnson, Lyman King, LULAC, Bill Lawson, Betty F Lopez, Josey Martinez, Romeo Munoz, Balakumar Pandian, Sandra Puente, Margarita V Quesada, Eddie Rodriguez, Beatrice Saloma, Alex Serna, Sandra Serna, Kathleen Maria Shaw, Jamaal R. Smith, Lionor Sorola-Pohlman,

		Texas State Conference of NAACP Branches, Travis County, Juanita Valdez-Cox, Marc Veasey, Juanita Wallace, Milton Gerard Washington. (Attachments: # 1 Affidavit)(Hicks, Max) (Entered: 02/22/2012)
02/22/2012	673	ADVISORY TO THE COURT by LULAC *Response to Court's Order of 2/21/2012 re CD23 in Plan 226.* (Attachments: # 1 Memo in Support)(Vera, Luis) (Entered: 02/22/2012)
02/22/2012	674	ADVISORY TO THE COURT by Alexander Green, Sheila Jackson-Lee, Eddie Bernice Johnson. (Attachments: # 1 Exhibit A)(Bledsoe, Gary) (Entered: 02/22/2012)
02/22/2012	675	ADVISORY TO THE COURT by State of Texas *REGARDING CONGRESSIONAL DISTRICT 23 IN PLAN C226.* (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Mattax, David) (Entered: 02/22/2012)
02/22/2012	676	ADVISORY TO THE COURT by Francisco Canseco *brief on CD23 and Plan C226.* (Gober, Christopher) (Entered: 02/22/2012)

02/22/2012	677	ADVISORY TO THE COURT by Joey Cardenas, Florinda Chavez, Sergio Coronado, Armando Cortez, Renato De Los Santos, Alex Jimenez, Emelda Menendez, Jose Olivares, Tomacita Olivares, Alejandro Ortiz, Rebecca Ortiz, Gregorio Benito Palomino, Socorro Ramos, Texas Latino Redistricting Task Force, Gilberto Torres, US Congressman Henry Cuellar, Cyn'thia Valadez, Cesar Eduardo Yevenes *regarding CD23 in C226.* (Couto, Rebecca) (Entered: 02/22/2012)
02/22/2012	678	ADVISORY TO THE COURT by Dorothy DeBose, Nancy Hall, Rudolfo Ortiz, Shannon Perez, Carmen Rodriguez, Sergio Salinas, Gregory Tamez *Regarding State Defendants' Advisory on House Redistricting.* (Richards, David) (Entered: 02/22/2012)
02/22/2012	679	ADVISORY TO THE COURT by Howard Jefferson, LULAC, Bill Lawson, Texas State Conference of NAACP Branches, Juanita Wallace *Jointly filed re: H303 and H283.* (Notzon, Robert) (Entered: 02/22/2012)

02/23/2012	680	ADVISORY TO THE COURT by Joey Cardenas, Florinda Chavez, Sergio Coronado, Armando Cortez, Renato De Los Santos, Alex Jimenez, Emelda Menendez, Mexican American Legislative Caucus, Texas House of Representatives, Jose Olivares, Tomacita Olivares, Alejandro Ortiz, Rebecca Ortiz, Gregorio Benito Palomino, Socorro Ramos, Texas Latino Redistricting Task Force, Gilberto Torres, US Congressman Henry Cuellar, Cynthia Valadez, Cesar Eduardo Yevenes *regarding Quesada Plan C234*. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5)(Couto, Rebecca) (Entered: 02/23/2012)
02/28/2012	681	ORDER - The court adopts PLAN C235 as the interim plan for the districts used to elect representatives in 2012 to the United States House of Representatives. Signed by Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith, Judge Xavier Rodriguez. (Attachments: # 1 Exhibit A, # 2 Exhibit B,

		# 3 Exhibit C)(mo,) (Entered: 02/28/2012)
02/28/2012	682	ORDER - The court adopts PLAN H309 as the interim plan for the districts used to elect representatives in 2012 to the Texas House of Representatives. Signed by Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith, and Judge Xavier Rodriguez. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(mo,) (Entered: 02/28/2012)
02/28/2012	683	ORDER granting relief as set forth herein in order to provide the Court time to enter necessary orders adopting interim plans for the United States House of Representatives, the Texas House of Representatives and the Texas State Senate. Therefore, it is ORDERED that the 2012 political convention process shall proceed as required under state and federal law except as provided for above. The State of Texas through the Secretary of State shall deliver an exact duplicate of this order to all election officials and county chairs, to the extent possible, within three days. The order shall

		also be posted by the Secretary of State on its website and the official election calendar as posted on the Secretary of State's website shall be updated to reflect the terms of this order. Signed by Judge Orlando L. Garcia. (kh,) (Entered: 02/28/2012)
03/01/2012	685	ORDER: The Court has entered redistricting plans for the 2012 elections for the United States House of Representatives, the Texas House of Representatives and the Texas State Senate. It is necessary to make certain adjustments to the election schedule and other provisions of the Texas Election Code for the 2012 elections. Signed by Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith, Judge Xavier Rodriguez. (tm) (Entered: 03/01/2012)
03/19/2012	689	AMENDED ORDER REGARDING ELECTION DEADLINES. Signed by Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith and Judge Xavier Rodriguez. (mo,) Modified on 3/19/2012 (mo,). (Entered: 03/19/2012)

03/19/2012	690	OPINION AND ORDER REGARDING PLAN H309 AS THE INTERIM PLAN FOR THE DISTRICTS TO BE USED TO ELECT MEMBERS IN 2012 TO THE TEXAS HOUSE OF REPRESENTATIVES. Signed by Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith and Judge Xavier Rodriguez. (mo,) (Entered: 03/19/2012)
03/19/2012	691	OPINION AND ORDER REGARDING PLAN C235 AS THE INTERIM PLAN FOR THE DISTRICTS USED TO ELECT MEMBERS IN 2012 TO THE UNITED STATES HOUSE OF REPRESENTATIVES. Signed by Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith and Judge Xavier Rodriguez. (mo,) (Entered: 03/19/2012)
08/29/2012	708	MOTION to Expedite by LULAC. (Vera, Luis) (Entered: 08/29/2012)
08/30/2012	710	ORDER GRANTING 708 Motion to Expedite. The panel will conduct a hearing at 1:30 p.m. on Friday, August 31, 2012 in Courtroom 2. Any party objecting to this conference or the time and

		date shall file an objection by 2:30 today. Signed by Judge Orlando L. Garcia. (kh,) (Entered: 08/30/2012)
08/31/2012	713	Minute Entry for proceedings held before Judge Orlando L. Garcia: Status Conference held on 8/31/2012 (Minute entry documents are not available electronically.). (Court Reporter Maurice West.)(tr1) (Entered: 08/31/2012)
09/05/2012	716	MOTION to Stay *Implementation of Interim Congressional Redistricting Plan C235* by LULAC. (Attachments: # 1 Proposed Order)(Vera, Luis) (Entered: 09/05/2012)
09/07/2012	717	Transcript filed of Proceedings held on 8/31/12, Proceedings Transcribed: Status Conference. Court Reporter/Transcriber: Maurice D. West, Telephone number: (210) 472-6574. Parties are notified of their duty to review the transcript to ensure compliance with the FRCP 5.2(a)/FRCrP 49.1(a). A copy may be purchased from the court reporter or viewed at the clerk's office public terminal. If redaction is necessary, a Notice of Redaction

		Request must be filed within 21 days. If no such Notice is filed, the transcript will be made available via PACER without redaction after 90 calendar days. The clerk will mail a copy of this notice to parties not electronically noticed Redaction Request due 9/28/2012. Redacted Transcript Deadline set for 10/9/2012. Release of Transcript Restriction set for 12/6/2012. (aej) (Entered: 09/07/2012)
09/07/2012	718	ORDER DENYING 716 Motion to Stay Implementation of Interim Congressional Redistricting Plan C235 filed by LULAC Plaintiff-Intervenor. Signed by Judge Orlando L. Garcia, Judge Jerry E. Smith, Judge Xavier Rodriguez. (tr1) (Entered: 09/07/2012)
09/19/2012	720	ORDER administratively staying case until October 15, 2012. Signed by Judge Orlando L. Garcia, Judge Jerry E. Smith, Judge Xavier Rodriguez. (tr1) (Entered: 09/19/2012)
09/19/2012		Case Stayed until October 15, 2012 (tr1) (Entered: 09/19/2012)
09/21/2012	721	ORDER extending deadline for filing written advisories on how

		the Court should proceed after the November 2012 elections to 12/3/12. Signed by Judge Orlando L. Garcia, Judge Jerry E. Smith, Judge Xavier Rodriguez. (tr1) (Entered: 09/21/2012)
10/03/2012	722	ORDER of Supreme Court DENYING application for stay. (filed in Supreme Court on 9/19/12)(rf) (Entered: 10/03/2012)
10/15/2012		Case No Longer Stayed (rf) (Entered: 10/15/2012)
11/14/2012	723	ORDER instructing parties to include in their advisory due December 3, 2012, a statement of whether this court should place this case in an administrative stay pending a decision from the Supreme Court on the § 5 issue. Signed by Judge Xavier Rodriguez. (tr1) (Entered: 11/14/2012)
12/03/2012	724	ADVISORY TO THE COURT by Eliza Alvarado, Nina Jo Baker, City of Austin, Bruce Elfant, David Gonzalez, Betty F Lopez, Josey Martinez, Balakumar Pandian, Eddie Rodriguez, Beatrice Saloma, Alex Serna, Sandra Serna, Lionor Sorola-Pohlman, Travis County, Juanita

		Valdez-Cox, Milton Gerard Washington. (Hicks, Max) (Entered: 12/03/2012)
12/03/2012	728	ADVISORY TO THE COURT by Hope Andrade, Rick Perry, State of Texas. (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B, # 3 Exhibit Exhibit C, # 4 Exhibit Exhibit D, # 5 Exhibit Exhibit E)(Mattax, David) (Entered: 12/03/2012)
03/22/2013	736	ADVISORY TO THE COURT by State of Texas. (Mattax, David) (Entered: 03/22/2013)
03/22/2013	738	ADVISORY TO THE COURT by City of Austin, Alexander Green, Sheila Jackson-Lee, Eddie Bernice Johnson, LULAC, Margarita V Quesada, Carmen Rodriguez, Eddie Rodriguez, Lionor Sorola-Pohlman, Texas State Conference of NAACP Branches, Marc Veasey, Juanita Wallace, Milton Gerard Washington. (Vera, Luis) (Entered: 03/22/2013)
03/22/2013	739	ADVISORY TO THE COURT by Debbie Allen, Eliza Alvarado, Nina Jo Baker, City of Austin, Dorothy DeBose, Bruce Elfant, David Gonzalez, Alexander Green, Nancy Hall, Jane Hamilton, Sheila

		Jackson-Lee, Howard Jefferson, John Jenkins, Eddie Bernice Johnson, Lyman King, LULAC, Bill Lawson, Betty F Lopez, Josey Martinez, Romeo Munoz, Rudolfo Ortiz, Balakumar Pandian, Shannon Perez, Sandra Puente, Margarita V Quesada, Carmen Rodriguez, Eddie Rodriguez, Sergio Salinas, Beatrice Saloma, Alex Serna, Sandra Serna, Kathleen Maria Shaw, Jamaal R. Smith, Lionor Sorola-Pohlman, Gregory Tamez, Texas State Conference of NAACP Branches, Travis County, Juanita Valdez-Cox, Marc Veasey, Juanita Wallace, Milton Gerard Washington. (Vera, Luis) (Entered: 03/22/2013)
04/05/2013	745	RESPONSE *to Advisories filed March 22, 2013* to 739 Advisory to the Court, by Rick Perry, State of Texas, John Steen. (Mattax, David) (Entered: 04/05/2013)
05/29/2013	747	Minute Entry for proceedings held before Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith, Judge Xavier Rodriguez: Status Conference held on 5/29/2013 (Minute entry documents are not available electronically.). (Court

		Reporter Leticia Rangel, Chris Poage.)(rf) Modified on 5/29/2013, to edit text (rf). (Entered: 05/29/2013)
05/29/2013	748	ORDER - On this day the Court held a hearing to discuss the status of this case. While future legislative enactments and/or and ruling(s) from the United States Supreme Court may change the course of these proceedings, the parties shall proceed with the following steps (as set out in the Order) on or before the dates listed: June 5, 2013, July 15, 2013 and July 29, 2013. Signed by Judge Orlando L. Garcia (on behalf of the three judge panel) (kh) (Entered: 05/29/2013)
06/05/2013	757	BRIEF regarding 748 Order, by Rick Perry, State of Texas, John Steen. (Mattax, David) (Entered: 06/05/2013)
06/28/2013	768	Opposed MOTION to Dismiss for Lack of Jurisdiction *Motion to Dismiss For Lack of Subject Matter Jurisdiction* by Rick Perry, State of Texas, John Steen. (Attachments: # 1 Exhibit Exhibit A, # 2 Proposed Order Proposed

		Order)(Mattax, David) (Entered: 06/28/2013)
06/29/2013	769	NOTICE *of Errata* by Rick Perry, State of Texas, John Steen re 768 Opposed MOTION to Dismiss for Lack of Jurisdiction *Motion to Dismiss For Lack of Subject Matter Jurisdiction* (Attachments: # 1Corrected Motion to Dismiss for Lack of Subject Matter Jurisdiction)(Frederick, Matthew) (Entered: 06/29/2013)
07/01/2013	770	Minute Entry for proceedings held before Judge Orlando L. Garcia: Status Conference held before the Three Judge Panel on 7/1/2013. (Minute entry documents are not available electronically.). (Court Reporter Leticia Rangel/Karl Meyers.)(kh) (Entered: 07/01/2013)
07/01/2013	771	ORDER DENYING 768 Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction. ORDERED that Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is DENIED without prejudice. Signed by Judge Orlando L. Garcia. (on behalf of

		the three judge panel) (kh) Modified text on 7/1/2013 (kh). (Entered: 07/01/2013)
07/01/2013	772	ORDER - After hearing from counsel on the status of the claims in this lawsuit, the Court finds that the parties should proceed as follows: 1) Motions for leave to amend pleadings due on or before Friday, July 12, 2013; responses due on or before Friday July 19, 2013. 2) Requests for attorneys fees and expenses due on or before Monday, July 22, 2013; responses due no later than Thursday, August 1, 2013. Any previously filed motions for attorneys fees should be re-filed as new motions. The motions to re-urge the previously filed motions for interim attorneys fees and costs (Dkt. # 750, 751) are DENIED as moot. 3) Supplementation of the record: The Court's order entered on May 29, 2013 is revised, in part, with deadlines of Monday, July 22, 2013 and August 5, 2013 as further set out in this Order. 4) Briefs on Section 3(c) of the Voting Rights Act and its possible impact on this case: On or before Monday, July 22, 2013, all parties shall

		simultaneously file briefs (either jointly or separately) on Section 3(c) of the Voting Rights Act and its possible impact on this case. To the extent that any party wishes to respond to any of the arguments in the briefs, a response may be filed on or before Thursday, August 1, 2013. Signed by Judge Orlando L. Garcia. (on behalf of the three judge panel) (kh) (Entered: 07/01/2013)
07/15/2013	784	Opposed MOTION to Amend Complaint *Amended* by John T Morris. (Attachments: # 1 Amended Complaint, # 2 Order)(Morris, John) (Entered: 07/15/2013)
07/25/2013	827	ADVISORY TO THE COURT by United States of America. (Attachments: # 1 Exhibit Exhibit 1, # 2 Exhibit Exhibit 2, # 3 Exhibit Exhibit 3, # 4 Exhibit Exhibit 4)(Sitton, Jaye) (Entered: 07/25/2013)
08/22/2013	871	Opposed MOTION *to Intervene* by United States of America. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5,

		# 6 Proposed Order)(Freeman, Daniel) (Entered: 08/22/2013)
09/06/2013	886	ORDER - After careful deliberation, the Court grants the parties' request to amend their pleadings and denies Defendants' motion to dismiss the 2011 claims as moot. All legal challenges and requests for injunctive, declaratory and equitable relief relating to the 2011 and 2013 enacted plans will remain in this Court. The Court has also concluded, however, that a full, fair and final review of all issues before this Court cannot be completed prior to the upcoming deadlines for the 2014 elections. Thus, for reasons explained herein, the Court ORDERS that the 2013 enacted plans for the United States House of Representatives (Plan C235) and the Texas House of Representatives (Plan H358) be used as interim plans for the 2014 elections. These plans are being used on an interim basis only, and nothing in this order should be construed as aruling on the merits of any claims, causes of actions, or requests for relief that have been asserted in this consolidated

		action. The Court therefore makes the following rulings: Plaintiffs' 2011 plan claims are not moot and Plaintiffs may amend their complaints to add requests for relief under § 3(c) of the Voting Rights Act. Defendants' motion to dismiss the 2011 plan claims as moot (docket no. 786) is DENIED. After the Supreme Courts decision in Shelby County, the Task Force Plaintiffs filed an emergency motion to amend the injunction preventing use of the 2011 plans because they had not been precleared. Since Texas has repealed the 2011 plans and does not intend to implement them, and they remain enjoined in any event unless and until the Court lifts the injunction, the motion (docket no. 761) is DENIED. Plaintiffs may amend or supplement their complaints to add claims under § 2 and the Constitution, as well as requests for relief under § 3(c) of the Voting Rights Act, with regard to the 2013 plans (Plan C235 and Plan H358). The motions for leave to amend or supplement filed by Congressman Cuellar (docket no. 774); the NAACP, African-American Congresspersons,

		LULAC, Rodriguez Plaintiffs, and Quesada Plaintiffs (docket no. 776); the Perez Plaintiffs (docket no. 777); the Mexican American Legislative Caucus (docket no. 779); and the Texas Latino Redistricting Task Force (docket no. 780) are GRANTED. The Perez Plaintiffs' original motion to amend (docket no. 775) is DISMISSED AS MOOT because an amended motion was filed. As noted, it is unclear whether some Plaintiffs are intending to maintain their 2011 plan claims or request § 3(c) relief with regard to the 2011 plan claims. Plaintiffs' amended complaints should clearly specify whether such claims are being maintained, and Plaintiffs are granted further leave to amend their proposed complaints to clarify their claims or to correct errors identified herein. The Texas Democratic Party and Gilberto Hinojosa, as well as John Morris, are granted leave to amend their complaints to assert political gerrymandering claims against the 2013 plans. The motion for leave to file amended cross-claim by the Texas Democratic Party and

		Gilberto Hinojosa (docket no. 778) and John Morriss motion for leave to amend (docket no. 784) are GRANTED. Morriss motion for extension of time to file (docket no. 782) is GRANTED. Morriss original motion to amend (docket no. 783) is DISMISSED AS MOOT because an amended motion was filed. Because the Court is allowing the Texas Democratic Party, Hinojosa, and Morris to assert political gerrymandering claims against the 2013 plans, their motions to reconsider the Courts dismissal of their political gerrymandering claims against the 2011 plans (docket nos. 384 , 386) are DENIED. The Court emphasizes that, in allowing amendment to assert new claims, including requests for relief under § 3(c), the Court makes no determination of the merits of those claims, but simply permits the Plaintiffs to place such claims before the Court. Signed by U.S. Circuit Judge Judge Jerry E. Smith, U.S. District Judge Orlando L. Garcia and U.S. District Judge Xavier Rodriguez. (kh) (Entered: 09/06/2013)

09/06/2013	887	ORDER GRANTING Plaintiffs opposed joint motion for leave to reopen the record to provide supplemental evidence (Dkt. # 789 790 822 826). Signed by Judge Orlando L. Garcia (on behalf of the three judge panel) (kh) (Entered: 09/06/2013)
09/09/2013		Text Order DENYING 884 Motion; DENYING 884 Motion for Preliminary Injunction entered by Judge Xavier Rodriguez. To the extent the plaintiffs are seeking immediate equitable or injunctive relief, the motion is denied for the reasons stated in the Court's order filed September 6, 2013 (docket no. 886). However, as also explained in the Court's order, the 2013 plans are being used on an interim basis only and the parties may continue to assert their requests for prospective equitable relief, but those requests will not be reached until a later date. This motion is terminated. (This is a text-only entry generated by the court. There is no document associated with this entry.) (XR) (Entered: 09/09/2013)

09/09/2013	891	FOURTH AMENDED COMPLAINT OF PLAINTIFFS TEXAS LATINO REDISTRICTING TASK FORCE, ET AL against Rick Perry, John Steen amending filed by Socorro Ramos, Renato De Los Santos, Cesar Eduardo Yevenes, Alejandro Ortiz, Cynthia Valadez, Gilberto Torres, Sergio Coronado, Florinda Chavez, Texas Latino Redistricting Task Force, Alex Jimenez, Emelda Menendez, Gregorio Benito Palomino, Tomacita Olivares, Joey Cardenas, Rebecca Ortiz, Armando Cortez, Jose Olivares.(kh) (Entered: 09/10/2013)
09/12/2013	893	SECOND AMENDED COMPLAINT IN INTERVENTION against Rick Perry, State of Texas, John Steen filed by US Congressman Henry Cuellar.(Rios, Rolando) Modified text on 9/12/2013 to reflect title of filing (kh). (Entered: 09/12/2013)
09/15/2013	894	AMENDED COMPLAINT *Third* against All Defendants amending, filed by LULAC.(Vera, Luis) (Entered: 09/15/2013)

09/17/2013	896	SECOND AMENDED COMPLAINT against All Defendants amending, filed by Juanita Valdez-Cox, Beatrice Saloma, Milton Gerard Washington, Josey Martinez, Nina Jo Baker, Alex Serna, Betty F Lopez, Eliza Alvarado, Sandra Serna, Travis County, David Gonzalez, Bruce Elfant, Balakumar Pandian, Eddie Rodriguez, Lionor Sorola-Pohlman, City of Austin.(Hicks, Max) Modified text on 9/17/2013 to reflect title of filing(kh). (Entered: 09/17/2013)
09/17/2013	897	THIRD AMENDED COMPLAINT against All Defendants amending, filed by Mexican American Legislative Caucus, Texas House of Representatives.(Garza, Jose) Modified text on 9/17/2013 to reflect title of filing (kh). (Entered: 09/17/2013)
09/18/2013	898	AMENDED COMPLAINT *5th Amended* against All Defendants amending, filed by Shannon Perez, Gregory Tamez, Dorothy DeBose, Carmen Rodriguez, Rudolfo Ortiz, LULAC, Sergio Salinas, Nancy

		Hall, TJ Carson, Jessica Farrar, Richard Nguyen Le, Wanda F. Roberts, Mary K. Brown, Dr. Dottie Jones.(Richards, David) (Entered: 09/18/2013)
09/18/2013	899	AMENDED COMPLAINT *(THIRD)* against All Defendants amending, filed by Debbie Allen, Jane Hamilton, Kathleen Maria Shaw, John Jenkins, Lyman King, Margarita V Quesada, Sandra Puente, Romeo Munoz, Marc Veasey, Jamaal R. Smith.(Hebert, J.) (Entered: 09/18/2013)
09/18/2013	900	AMENDED COMPLAINT *(Third)* against Hope Andrade, David Dewhurst, Rick Perry, State of Texas, Joe Straus amending, filed by Juanita Wallace, Bill Lawson, Texas State Conference of NAACP Branches, Howard Jefferson.(Riggs, Allison) (Entered: 09/18/2013)
09/18/2013	901	AMENDED COMPLAINT *(Second)* against All Defendants amending, filed by Eddie Bernice Johnson, Alexander Green, Sheila Jackson-Lee.(Bledsoe, Gary) (Entered: 09/18/2013)
09/18/2013	902	AMENDED CROSSCLAIM *(First)* against Rick Perry, John

		Steen amending, filed by Gilberto Hinojosa, Texas Democratic Party.(Dunn, Chad) Modified text on 9/18/2013 (kh). (Entered: 09/18/2013)
09/23/2013	903	ANSWER to 891 Amended Complaint, *Texas Latino Redistricting Task Force, et al.'s* by Rick Perry, State of Texas, John Steen.(Sweeten, Patrick) (Entered: 09/23/2013)
09/24/2013	904	ORDER GRANTING 871 United States' Motion to Intervene Signed by Judge Orlando L. Garcia and Judge Xavier Rodriguez. United States Circuit Judge Jerry E. Smith, dissenting. (kh) (Entered: 09/24/2013)
09/25/2013	907	COMPLAINT *in Intervention* (Filing fee $ 400.). No Summons requested at this time, filed by United States of America. (Freeman, Daniel) (Entered: 09/25/2013)
09/26/2013	908	ANSWER to 893 Amended Complaint by Rick Perry, State of Texas, John Steen.(Sweeten, Patrick) (Entered: 09/26/2013)
09/30/2013	909	*Defendants'* ANSWER to 894 Amended Complaint *LULAC's*

		Third Amended Complaint by David Dewhurst, Rick Perry, State of Texas, John Steen, Joe Straus.(Sweeten, Patrick) (Entered: 09/30/2013)
10/01/2013	910	*Defendants'* ANSWER to 897 Amended Complaint *MALC's Third Amended Complaint* by Rick Perry, State of Texas, John Steen.(Sweeten, Patrick) (Entered: 10/01/2013)
10/01/2013	911	*Defendants'* ANSWER to 896 Amended Complaint, *Second Amended Complaint* by David Dewhurst, Rick Perry, State of Texas, John Steen, Joe Straus.(Sweeten, Patrick) (Entered: 10/01/2013)
10/01/2013	912	*CORRECTED Defendants'* ANSWER to 896 Amended Complaint, *Rodriguez's Second Amended Complaint* by David Dewhurst, Rick Perry, State of Texas, John Steen, Joe Straus.(Sweeten, Patrick) (Entered: 10/01/2013)
10/02/2013	913	ANSWER to 898 Amended Complaint, *of Perez Plaintiffs* by David Dewhurst, Rick Perry, State of Texas, John Steen, Joe

		Straus.(Sweeten, Patrick) (Entered: 10/02/2013)
10/02/2013	915	ANSWER to 902 Amended Crossclaim *of Texas Democratic Party and Hinojosa* by Rick Perry, State of Texas, John Steen.(Sweeten, Patrick) (Entered: 10/02/2013)
10/02/2013	916	ANSWER to 899 Amended Complaint *of Quesada Plaintiffs* by Rick Perry, State of Texas, John Steen.(Sweeten, Patrick) (Entered: 10/02/2013)
10/02/2013	917	ANSWER to 901 Amended Complaint *of Congressional Intervenors* by David Dewhurst, Rick Perry, State of Texas, John Steen, Joe Straus.(Sweeten, Patrick) (Entered: 10/02/2013)
10/02/2013	918	ANSWER to 900 Amended Complaint *of NAACP* by David Dewhurst, Rick Perry, State of Texas, John Steen, Joe Straus.(Sweeten, Patrick) (Entered: 10/02/2013)
10/09/2013	922	*Defendants'* ANSWER to 907 Complaint *in Intervention by the United States* by State of Texas, John Steen.(Sweeten, Patrick) (Entered: 10/09/2013)

10/09/2013	924	ADVISORY TO THE COURT by Rick Perry, State of Texas, John Steen. (Attachments: # 1 Proposed Order Defendants' Proposed Scheduling Order)(Sweeten, Patrick) (Entered: 10/09/2013)
10/18/2013	926	SCHEDULING ORDER: Bench Trial set for 7/14/2014 8:30 AM before Judge Orlando L. Garcia, Pretrial Conference set for 7/2/2014 08:30 AM before Judge Orlando L. Garcia, Amended Pleadings due by 3/3/2014, Joinder of Parties due by 3/3/2014, Dispositive Motions due by 4/2/2014. Signed by Judge Orlando L. Garcia. (rg) (Entered: 10/18/2013)
11/05/2013	927	*Defendants'* ANSWER to Complaint *Plaintiff John T. Morris's Opposed Second Amended Complaint* by Rick Perry, State of Texas, John Steen.(Sweeten, Patrick) (Entered: 11/05/2013)
01/21/2014	953	Joint MOTION *Joint Motion to Modify Scheduling Order* re 926 Scheduling Order, by Rick Perry, State of Texas, John Steen. (Attachments: # 1 Exhibit

		Proposed Modified Scheduling Order, # 2 Proposed Order)(Sweeten, Patrick) (Entered: 01/21/2014)
01/21/2014	954	ORDER, (Amended Pleadings due by 3/3/2014, Discovery due by 5/30/2014, Motions due by 4/23/2014, Jury Selection set for 7/14/2014 8:30AM before Judge Orlando L. Garcia,, Jury Trial set for 7/14/2014 8:30 AM before Judge Orlando L. Garcia,, Pretrial Conference set for 7/2/2014 8:30 AM before Judge Orlando L. Garcia,), GRANTING 953 Joint MOTION *Joint Motion to Modify Scheduling Order.*. Signed by Judge Xavier Rodriguez. (rf) (Entered: 01/22/2014)
02/20/2014	958	STIPULATION *Between Rodriguez Plaintiffs and State Defendants* by Rick Perry, State of Texas, John Steen. (Sweeten, Patrick) (Entered: 02/20/2014)
02/25/2014	960	6th AMENDED COMPLAINT against State of Texas, et.al. amending 898 Amended Complaint, filed by TJ Carson, Jessica Farrar, Richard Nguyen Le, Shannon Perez, Gregory Tamez, Dorothy DeBose, Carmen

		Rodriguez, Wanda F. Roberts, LULAC, Sergio Salinas, Nancy Hall.(wg) (Entered: 02/26/2014)
02/28/2014	964	ANSWER to 960 Amended Complaint, *Sixth Amended Complaint of Perez Plaintiffs* by Rick Perry, State of Texas, John Steen.(Sweeten, Patrick) (Entered: 02/28/2014)
05/01/2014	984	MOTION to Expedite, MOTION *for Leave to Depose Gerardo Interiano and Ryan Downton* by United States of America. (Attachments: # 1 Proposed Order)(Sells, Bryan) (Entered: 05/01/2014)
05/05/2014	985	Response in Opposition to Motion, filed by Rick Perry, State of Texas, John Steen, re 984 MOTION to Expedite MOTION *for Leave to Depose Gerardo Interiano and Ryan Downton* filed by Intervenor Plaintiff United States of America *Response to Motion for Leave to Depose Interiano and Downton* (Attachments: # 1 Exhibit A)(Sweeten, Patrick) (Entered: 05/05/2014)
05/06/2014	986	ORDER GRANTING 984 Expedited Motion to Depose

		Gerardo Interiano and Ryan Downton. Signed by Judge Orlando L. Garcia. (aej) (Entered: 05/06/2014)
05/06/2014	987	STIPULATION *Between Defendants and MALC Regarding Alonzo* by Rick Perry, State of Texas, John Steen. (Sweeten, Patrick) (Entered: 05/06/2014)
05/14/2014	995	Opposed MOTION to Dismiss by Rick Perry, State of Texas, John Steen. (Attachments: # 1 Proposed Order)(Sweeten, Patrick) (Entered: 05/14/2014)
05/14/2014	996	Opposed MOTION for Summary Judgment *AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES* by Rick Perry, State of Texas, Nandita Berry. (Attachments: # 1 Proposed Order, # 2Appendix, # 3 Exhibit A.Declaration of Patrick Sweeten, # 4 Exhibit A-1.Transcript, Public Hearing,, # 5 Exhibit A-2.Texas House Journal, Supplement (June 20, 2013) (excerpts), # 6 Exhibit A-3.Plan H309, Red-116, Red-119 Reports, # 7 Exhibit A-4.Texas House Journal (June 20, 2013), pages 206-212, # 8 Exhibit A-

		5.Plan H358, Red-116, Red-119 Reports, # 9 Exhibit A-6.Transcript, Deposition of Sergio De Leon (excerpt), # 10 Exhibit A-7.Defendants Second Set of Interrogatories to TLRTF, # 11 Exhibit A-8.TLRTF Responses to Defendants Second Set of Interrogatories, # 12 Exhibit A-9.Transcript, Deposition of Salvador Espino (excerpt), # 13 Exhibit A-10.Plan C235, Red-116, Red-315 Reports, # 14 Exhibit Plan C236, Red-116, Red-315 Reports, # 15 Exhibit A-12.Plan C238, Red-116, Red-315 Reports, # 16Exhibit A-13.Plan C241, Red-116, Red-315 Reports, # 17 Exhibit A-14.Plan C248, Red-116, Red-315 Reports, # 18 Exhibit A-15.Plan C251, Red-116, Red-315 Reports, # 19 Exhibit A-16.TLC American Community Survey, # 20 Exhibit A-17.Plan H314, Red-116 Report, # 21 Exhibit A-18.Plan H334, Red-116 Report, # 22 Exhibit A-19.Plan H366, Red-116 Report, # 23 Exhibit A-20.Plan H329, Red-116 Report, # 24 Exhibit A-21.Plan H333, Red-116 Report, # 25 Exhibit A-22.Plan H364, Red-116 Report, # 26 Exhibit A-

		23.Plan H365, Red-116 Report, # 27 Exhibit B.Declaration of John Alford, Ph.D, # 28Exhibit C.Letter from Perales to Sen. Seliger and Rep. Darby (June 22, 2013))(Sweeten, Patrick) (Entered: 05/14/2014)
06/06/2014	1052	ORDER Pursuant to the Court's most recent order regarding trial time and order ofpresentation of evidence (Dkt. # 1018), the parties filed advisories providing theirestimates of the number of trial hours needed for each of the four segments on liabilityissues. Based on the parties' estimates, trial on the 2011 Texas House plan will last atleast 35 hours, and possibly up to 52 hours. The Court has therefore determined that, subject to any rulings on pending matters such as motions to dismiss and for summary judgment, it will hear evidence only on the 2011 Texas House plan in the first segmentof trial, from Monday July 14 to Saturday July 19. The next three segments of trial, which include challenges to the 2011 Congressional plan, 2013 Texas House plan, andthe 2013 Congressional plan, will take place

		on dates to be determined in the near future.The parties will be notified when dates for the remaining segments of trial have beendetermined.1 The parties should prepare for trial accordingly.The pretrial conference remains scheduled for 8:30 a.m. onJuly 2, 2014, re 1018 Order. Signed by Judge Orlando L. Garcia. (rf) (Entered: 06/06/2014)
06/09/2014	1053	STIPULATION *BETWEEN AND AMONG THE STATE DEFENDANTS AND THE CONGRESSPERSONS AND NAACP PLAINTIFF-INTERVENORS* by Nandita Berry, Rick Perry, State of Texas. (Sweeten, Patrick) Modified on 6/9/2014 to select all filers(aej). (Entered: 06/09/2014)
06/09/2014		Notice of Correction: ***NOTIFIED COUNSEL THAT Plaintiffs Eddie Bernice Johnson, Al Green, and Sheila Jackson-Lee and Texas State Conference of NAACPBranches, Juanita Wallace, Rev. Bill Lawson, and Howard Jefferson HAVE BEEN ADDED AS FILERS TO THIS DOCUMENT***re 1053

		Stipulation. (aej) (Entered: 06/09/2014)
06/09/2014	1061	MOTION to Exclude *Evidence* by Nandita Berry, Rick Perry, State of Texas. (Attachments: # 1 Proposed Order)(Sweeten, Patrick) (Entered: 06/09/2014)
06/09/2014	1065	Response in Opposition to Motion, filed by City of Austin, Dorothy DeBose, Harold Dutton, Jr, Bruce Elfant, Alexander Green, Jane Hamilton, Sheila Jackson-Lee, Howard Jefferson, John Jenkins, Eddie Bernice Johnson, LULAC, Bill Lawson, Betty F Lopez, Romeo Munoz, Balakumar Pandian, Shannon Perez, Margarita V Quesada, Carmen Rodriguez, Eddie Rodriguez, Sergio Salinas, Beatrice Saloma, Alex Serna, Sandra Serna, Gregory Tamez, Texas State Conference of NAACP Branches, Travis County, Marc Veasey, Juanita Wallace, Milton Gerard Washington, re 996 Opposed MOTION for Summary Judgment *AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES* filed by Defendant State of Texas, Defendant Rick Perry, Defendant

		Nandita Berry *(Joint)* (Attachments: # 1 Exhibit A - State Answers to Perez IROGs, # 2 Exhibit B - Ansolabehere Report 2 28 14, # 3 Exhibit C - Ansolabehere Rebuttal 4 28 14, # 4 Exhibit D - Opiela email, # 5 Exhibit E - Lichtman Report 2 28 14, # 6 Exhibit F - Abbott Letter)(Riggs, Allison) (Entered: 06/09/2014)
06/09/2014	1082	ORDER GRANTING 1062 Motion to Extend Scheduling Order Deadlines; MOOTING 1063 Motion to Expedite. The new deadline for filing exhibit lists, witness lists, and designations of deposition testimony for the last three segments of trial will be July 9, 2014. The new deadline for filing counter designations of deposition testimony for the last three segments of trial will be July 23, 2014. Signed by Judge Orlando L. Garcia. (aej) (Entered: 06/10/2014)
06/10/2014		Text Order GRANTING IN PART AND DENYING IN PART 1061 Motion to exclude entered by Judge Xavier Rodriguez. The DC Court opinion cannot be used to prove defects in the 2011 maps or to prove any

		factual findings or legal conclusions issued by the DC Court. Whether the DC Court opinion can be used for any other purposes is dependent on the purpose for which it is offered. (This is a text-only entry generated by the court. There is no document associated with this entry.) (XR) (Entered: 06/10/2014)
06/17/2014	1104	ORDER GRANTING IN PART AND DENYING IN PART 995 Motion to Dismiss. The motion to dismiss the 2011 plan claims as moot is DENIED and the motion to dismiss the political gerrymandering claims against the 2013 plan claims is GRANTED. Accordingly, all claims asserted by TDP and Morris are DISMISSED. The Court expresses no view on the ultimate merits or chances of success of the claims that remain for decision. Signed by Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith, Judge Xavier Rodriguez. (aej) Modified on 6/17/2014 to include all Judges (aej). (Entered: 06/17/2014)
06/23/2014	1108	ORDER that summary judgment is GRANTED on all Fifteenth

		Amendment claims asserted against the 2013 redistricting plans. The remaining arguments in the State Defendants' motion for partial summary judgment remain under consideration. Signed by Judge Orlando L. Garcia, Circuit Judge Jerry E. Smith, Judge Xavier Rodriguez. (aej) Modified on 6/23/2014 to include all Judges(aej). (Entered: 06/23/2014)
07/01/2014		The Court has granted summary judgment on the Fifteenth Amendment claims (Dkt. #1108). The Court has determined that the most prudent course of action is to carry the remaining issues forward, hear the evidence presented at trial, and then resolve the legal and factual issues on the remaining claims. See Firman v. Life Ins. Co. of N. Am., 684 F.3d 533, 538 (5th Cir. 2012)("Even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that 'the better course would be to proceed to a full trial.'")(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)); see also Harris v. Bruister, 2013 WL 6805155 *2 (S.D. Miss. Dec.

		20, 2013)("Because a bench trial cannot be avoided, it is more prudent to carry the close issues forward and deny summary judgment.")entered by Judge Orlando L. Garcia. (This is a text-only entry generated by the court. There is no document associated with this entry.) (ju) (Entered: 07/01/2014)
07/01/2014		In addition to any other matters that need to be raised or discussed at the pretrial conference scheduled for July 2, 2014, the Court will hear oral argument on the following pending motions: (1) The United States' motion to compel production of documents from Denise Davis (Dkt. # 1107); and (2) The Congresspersons' motion to compel deposition testimony of Chairman Darby (Dkt. # 1069). Counsel for the movants and non-movants should be prepared to answer any questions posed by the panel entered by Judge Orlando L. Garcia. (This is a text-only entry generated by the court. There is no document associated with this entry.) (ju) (Entered: 07/01/2014)

07/02/2014	1123	Minute Entry for proceedings held before Judge Orlando L. Garcia: Pretrial Conference held on 7/2/2014 (Minute entry documents are not available electronically.). (Court Reporter Leticia Rangel/Karl Myers/Chris Poage.)(aej) (Entered: 07/02/2014)
07/03/2014		The Court has determined that the second segment of trial on the 2011 Congressional plan will commence on Monday, August 11, 2014 and continue day to day until finished. The Court currently anticipates setting aside the entire week (August 11-15) for trial, and will continue on Saturday, August 16 if necessary. The parties previously provided their estimates for anticipated length of trial on each of the four segments (Dkt. # 1004) but those estimates may have changed. It is therefore ORDERED that the parties file a joint advisory no later than July 9, 2014 stating their current estimate(s) for length of the second segment of trial. Because the second segment of trial is scheduled to begin on August 11, only a short extension on the deadlines to file witness lists,

		exhibits lists, designation of deposition testimony, and counter designation of deposition testimony will be permitted. The previous deadlines, set forth in the order entered on June 9, 2014 (Dkt. # 1082), are EXTENDED three business days, as follows: The parties must file their witness lists, exhibit lists, and designation of deposition testimony for the second segment of trial no later than Monday, July 14; the parties must file their counter designation of deposition testimony no later than Monday, July 28. The Court will hold a pretrial conference at 8:30 a.m. on Tuesday, July 29, 2014 to discuss any matters that need to be resolved prior to the second segment of trial entered by Judge Orlando L. Garcia. (This is a text-only entry generated by the court. There is no document associated with this entry.) (ju) (Entered: 07/03/2014)
07/14/2014	1161	Minute Entry for proceedings held before Judge Orlando L. Garcia/Jerry E. Smith/Xavier Rodriguez: Bench Trial begun on 7/14/2014 (Minute entry documents are not available

		electronically). (Court Reporter Leticia Rangel/Karl Myers.)(aej) Modified on 7/16/2014 to include all judges(aej). (Entered: 07/15/2014)
07/15/2014	1164	Minute Entry for proceedings held before Judge Orlando L. Garcia/Jerry E. Smith/Xavier Rodriguez: Bench Trial held on 7/15/2014 (Minute entry documents are not available electronically.) (Court Reporter Leticia Rangel/Karl Myers/Kristin Anderson/Chris Poage.)(aej) (Entered: 07/16/2014)
07/16/2014	1166	Minute Entry for proceedings held before Judge Orlando L. Garcia: Bench Trial held on 7/16/2014 (Minute entry documents are not available electronically.). (Court Reporter Leticia Rangel/Karl Myers/Kristin Anderson/Chris Poage.)(aej) (Entered: 07/17/2014)
07/17/2014	1167	Minute Entry for proceedings held before Judge Orlando L. Garcia/Jerry E. Smith/Xavier Rodriguez: Bench Trial held on 7/17/2014 (Minute entry documents are not available electronically.). (Court Reporter Leticia Rangel/Karl Myers.Kristin Anderson/Chris Poage.)(aej)

		Modified on 7/18/2014 to add all Judges(aej). (Entered: 07/18/2014)
07/18/2014	1170	Minute Entry for proceedings held before Judge Orlando L. Garcia/Jerry E. Smith/Xavier Rodriguez: Bench Trial held on 7/18/2014 (Minute entry documents are not available electronically.). (Court Reporter Leticia Rangel/Karl Myers/Kristin Anderson/Chris Poage.)(aej) (Entered: 07/21/2014)
07/19/2014	1171	Minute Entry for proceedings held before Judge Orlando L. Garcia/Jerry E. Smith/Xavier Rodriguez: Bench Trial held on 7/19/2014 (Minute entry documents are not available electronically.). (Court Reporter Leticia Rangel/Chris Poage/Karl Myers/Kristin Anderson.)(aej) (Entered: 07/21/2014)
07/25/2014	1183	TRIAL BRIEF *(Summary of closing arguments)* by Howard Jefferson, Bill Lawson, Texas State Conference of NAACP Branches, Juanita Wallace. (Riggs, Allison) (Entered: 07/25/2014)
07/25/2014	1184	TRIAL BRIEF *Defendants' Bench Brief 2011 House Trial* by Nandita Berry, Rick Perry, State

		of Texas. (Sweeten, Patrick) (Entered: 07/25/2014)
07/25/2014	1185	TRIAL BRIEF *closing argument summary* by Mexican American Legislative Caucus, Texas House of Representatives. (Garza, Jose) (Entered: 07/25/2014)
07/25/2014	1186	TRIAL BRIEF by United States of America. (Sitton, Jaye) (Entered: 07/25/2014)
07/25/2014	1187	TRIAL BRIEF *Summary of Closing Arguments on Evidence Regarding the 2011 House Plan* by Joey Cardenas, Florinda Chavez, Sergio Coronado, Armando Cortez, Renato De Los Santos, Alex Jimenez, Emelda Menendez, Jose Olivares, Tomacita Olivares, Alejandro Ortiz, Rebecca Ortiz, Rudolfo Ortiz, Gregorio Benito Palomino, Socorro Ramos, Texas Latino Redistricting Task Force, Gilberto Torres, Cynthia Valadez, Cesar Eduardo Yevenes. (Perales, Nina) (Entered: 07/25/2014)
07/29/2014	1192	Minute Entry for proceedings held before Judge Orlando L. Garcia/Jerry E. Smith/Xavier Rodriguez: Bench Trial held on 7/29/2014 (Minute entry

		documents are not available electronically.). (Court Reporter Leticia Rangel/Karl Myers/Gail Deml/Lauren Laux.)(aej) Modified on 7/29/2014 to include all Judges(aej). (Entered: 07/29/2014)
08/11/2014	1209	Minute Entry for proceedings held before Judge Orlando L. Garcia, Jerry E. Smith, Xavier Rodriguez: Bench Trial held on 8/11/2014 (Minute entry documents are not available electronically.). (Court Reporter Chris Poage, Leticia Rangel, Karl Myes.)(aej) Modified on 8/12/2014 to add all Judges(aej). (Entered: 08/12/2014)
08/12/2014	1212	Minute Entry for proceedings held before Judge Orlando L. Garcia, Jerry E. Smith, Xavier Rodriguez: Bench Trial held on 8/12/2014 (Minute entry documents are not available electronically.). (Court Reporter Chris Poage, Karl Myers, Leticia Rangel, Kristin Anderson.)(aej) Modified on 8/13/2014 to add all Judges(aej). (Entered: 08/13/2014)
08/13/2014	1213	Minute Entry for proceedings held before Judge Orlando L. Garcia, Jerry E. Smith, Xavier Rodriguez: Bench Trial held on 8/13/2014

		(Minute entry documents are not available electronically.) (Court Reporter Leticia Rangel, Karl Myers, Chris Poage, Kridtin Anderson.)(aej) (Entered: 08/14/2014)
08/14/2014	1214	Exhibit List *Defendants' Third Amended Exhibit List- 2011 Congressional* by Nandita Berry, Rick Perry, State of Texas. (Sweeten, Patrick) (Entered: 08/15/2014)
08/14/2014	1215	Minute Entry for proceedings held before Judge Orlando L. Garcia, Jerry E. Smith, Xavier Rodriguez: Bench Trial held on 8/14/2014 (Minute entry documents are not available electronically). (Court Reporter Karl Myers, Chris Poage, Leticia Rangel, Kristen Anderson.)(aej) (Entered: 08/15/2014)
08/15/2014	1216	Minute Entry for proceedings held before Judge Orlando L. Garcia, Jerry E. Smith, Xavier Rodriguez: Bench Trial held on 8/15/2014 (Minute entry documents are not available electronically.). (Court Reporter Kristin Anderson, Karl Myers, Chris Poage, Leticia

		Rangel.)(aej) (Entered: 08/18/2014)
08/16/2014	1217	Minute Entry for proceedings held before Judge Orlando L. Garcia, Jerry E. Smith, Xavier Rodriguez: Bench Trial held on 8/16/2014 (Minute entry documents are not available electronically.). (Court Reporter Leticia Rangel, Karl Myers, Chris Poage, Kristin Anderson.)(aej) (Entered: 08/18/2014)
08/21/2014	1228	TRIAL BRIEF *closing argument summary* by Mexican American Legislative Caucus, Texas House of Representatives. (Garza, Jose) (Entered: 08/21/2014)
08/21/2014	1229	TRIAL BRIEF *2011 Congressional Trial Bench Brief* by Nandita Berry, Rick Perry, State of Texas. (Sweeten, Patrick) (Entered: 08/21/2014)
08/21/2014	1230	Exhibit List *Task Force Plaintiffs' Third Supplemental Proposed Exhibit List for the 2014 Trial on the 2011 Texas Congressional Plan* by Joey Cardenas, Florinda Chavez, Sergio Coronado, Armando Cortez, Renato De Los Santos, Alex Jimenez, Emelda Menendez, Jose Olivares,

		Tomacita Olivares, Alejandro Ortiz, Rebecca Ortiz, Rudolfo Ortiz, Gregorio Benito Palomino, Socorro Ramos, Texas Latino Redistricting Task Force, Gilberto Torres, Cynthia Valadez, Cesar Eduardo Yevenes.. (Perales, Nina) (Entered: 08/21/2014)
08/21/2014	1231	TRIAL BRIEF by Eliza Alvarado, Nina Jo Baker, City of Austin, Bruce Elfant, David Gonzalez, Betty F Lopez, Josey Martinez, Balakumar Pandian, Eddie Rodriguez, Beatrice Saloma, Alex Serna, Sandra Serna, Lionor Sorola-Pohlman, Travis County, Juanita Valdez-Cox, Milton Gerard Washington. (Hicks, Max) (Entered: 08/21/2014)
08/21/2014	1232	TRIAL BRIEF *(summary of closing arguments - 2011 Congress)* by Howard Jefferson, Bill Lawson, Texas State Conference of NAACP Branches, Juanita Wallace. (Riggs, Allison) (Entered: 08/21/2014)
08/21/2014	1233	TRIAL BRIEF *Post-Trial Summary Regarding 2011 Congressional Trial* by United States of America. (Sitton, Jaye) (Entered: 08/21/2014)

08/21/2014	1234	TRIAL BRIEF *of Quesada Plaintiffs Summarizing Arguments* by Debbie Allen, Nancy Hall, Jane Hamilton, John Jenkins, Sandra Puente, Margarita V Quesada, Kathleen Maria Shaw, Jamaal R. Smith, Marc Veasey. (Hebert, J.) (Entered: 08/21/2014)
08/21/2014	1235	NOTICE *Summary of LULAC Argument of Plan C185* by LULAC (Vera, Luis) (Entered: 08/21/2014)
08/21/2014	1236	TRIAL BRIEF *Texas Latino Redistricting Task Force Summary of Closing Arguments: 2011 Congressional Plan* by Joey Cardenas, Florinda Chavez, Sergio Coronado, Armando Cortez, Renato De Los Santos, Alex Jimenez, Emelda Menendez, Jose Olivares, Tomacita Olivares, Alejandro Ortiz, Rebecca Ortiz, Rudolfo Ortiz, Gregorio Benito Palomino, Socorro Ramos, Texas Latino Redistricting Task Force, Gilberto Torres, Cynthia Valadez, Cesar Eduardo Yevenes. (Perales, Nina) (Entered: 08/21/2014)
08/21/2014	1237	TRIAL BRIEF by Alexander Green, Sheila Jackson-Lee, Eddie

		Bernice Johnson. (Bledsoe, Gary) (Entered: 08/21/2014)
08/26/2014	1243	Minute Entry for proceedings held before Judge Orlando L. Garcia, Jerry E. Smith, Xavier Rodriguez: Bench Trial held on 8/26/2014 (Minute entry documents are not available electronically.). (Court Reporter Leticia Rangel, Karl Myers, Chris Poage.)(rf) (Entered: 08/27/2014)
10/21/2014	1263	TRIAL BRIEF *Post* by TJ Carson, Dorothy DeBose, Jessica Farrar, Nancy Hall, Richard Nguyen Le, Shannon Perez, Wanda F. Roberts, Carmen Rodriguez, Sergio Salinas, Gregory Tamez. (Attachments: # 1 Exhibit 1)(Richards, David) (Entered: 10/21/2014)
10/21/2014	1264	Proposed Findings of Fact by TJ Carson, Dorothy DeBose, Jessica Farrar, Nancy Hall, Richard Nguyen Le, Shannon Perez, Wanda F. Roberts, Carmen Rodriguez, Sergio Salinas, Gregory Tamez. (Richards, David) (Entered: 10/21/2014)
10/21/2014	1265	Proposed Findings of Fact by TJ Carson, Dorothy DeBose, Jessica Farrar, Nancy Hall, Shannon

		Perez, Wanda F. Roberts, Carmen Rodriguez, Sergio Salinas, Gregory Tamez. (Richards, David) (Entered: 10/21/2014)
10/30/2014	1272	TRIAL BRIEF *Defendant's Post-Trial Brief* by Nandita Berry, Rick Perry, State of Texas. (Frederick, Matthew) (Entered: 10/30/2014)
10/30/2014	1273	TRIAL BRIEF *on whole county requirement* by Mexican American Legislative Caucus, Texas House of Representatives. (Garza, Jose) (Entered: 10/30/2014)
10/30/2014	1274	Amended Proposed Findings of Fact 1271 by Florinda Chavez, Sergio Coronado, Armando Cortez, Renato De Los Santos, Alex Jimenez, Emelda Menendez, Jose Olivares, Tomacita Olivares, Alejandro Ortiz, Rebecca Ortiz, Rudolfo Ortiz, Gregorio Benito Palomino, Socorro Ramos, Texas Latino Redistricting Task Force, Gilberto Torres, Cynthia Valadez, Cesar Eduardo Yevenes. (Perales, Nina) Modified docket text on 10/31/2014 (aej). (Entered: 10/30/2014)
10/30/2014	1275	Proposed Findings of Fact by Mexican American Legislative

		Caucus, Texas House of Representatives. (Garza, Jose) (Entered: 10/30/2014)
10/30/2014	1276	Proposed Findings of Fact by Nandita Berry, Rick Perry, State of Texas. (Sweeten, Patrick) (Entered: 10/30/2014)
10/30/2014	1277	BRIEF by Debbie Allen, Eliza Alvarado, Nina Jo Baker, City of Austin, Bruce Elfant, David Gonzalez, Jane Hamilton, John Jenkins, LULAC, Betty F Lopez, Josey Martinez, Romeo Munoz, Balakumar Pandian, Sandra Puente, Margarita V Quesada, Eddie Rodriguez, Beatrice Saloma, Alex Serna, Sandra Serna, Kathleen Maria Shaw, Jamaal R. Smith, Lionor Sorola-Pohlman, Travis County, Juanita Valdez-Cox, Marc Veasey, Milton Gerard Washington. (Attachments: # 1 Appendix FF-CL (prop))(Hicks, Max) (Entered: 10/30/2014)
10/30/2014	1277	BRIEF by Debbie Allen, Eliza Alvarado, Nina Jo Baker, City of Austin, Bruce Elfant, David Gonzalez, Jane Hamilton, John Jenkins, LULAC, Betty F Lopez, Josey Martinez, Romeo Munoz,

		Balakumar Pandian, Sandra Puente, Margarita V Quesada, Eddie Rodriguez, Beatrice Saloma, Alex Serna, Sandra Serna, Kathleen Maria Shaw, Jamaal R. Smith, Lionor Sorola-Pohlman, Travis County, Juanita Valdez-Cox, Marc Veasey, Milton Gerard Washington. (Attachments: # 1 Appendix FF-CL (prop))(Hicks, Max) (Entered: 10/30/2014)
10/30/2014	1278	Proposed Findings of Fact by United States of America. (Freeman, Daniel) (Entered: 10/30/2014)
10/30/2014	1279	TRIAL BRIEF by United States of America. (Freeman, Daniel) (Entered: 10/30/2014)
10/30/2014	1280	TRIAL BRIEF by Alexander Green, Sheila Jackson-Lee, Howard Jefferson, Eddie Bernice Johnson, Bill Lawson, Texas State Conference of NAACP Branches, Juanita Wallace. (Riggs, Allison) (Entered: 10/30/2014)
10/30/2014	1281	Proposed Findings of Fact by Alexander Green, Sheila Jackson-Lee, Howard Jefferson, Eddie Bernice Johnson, Bill Lawson, Texas State Conference of

		NAACP Branches, Juanita Wallace. (Riggs, Allison) (Entered: 10/30/2014)
10/31/2014	1282	TRIAL BRIEF *Post-Trial Brief of Plaintiffs Texas Latino Redistricting Task Force, Et Al.* by Joey Cardenas, Florinda Chavez, Sergio Coronado, Armando Cortez, Renato De Los Santos, Alex Jimenez, Emelda Menendez, Jose Olivares, Tomacita Olivares, Alejandro Ortiz, Rebecca Ortiz, Rudolfo Ortiz, Gregorio Benito Palomino, Socorro Ramos, Texas Latino Redistricting Task Force, Gilberto Torres, Cynthia Valadez, Cesar Eduardo Yevenes. (Perales, Nina) (Entered: 10/31/2014)
11/18/2014	1284	ORDER, The parties should address, in five pages or less, whether there is an overlap in the issues and whether this Court should await a decision by the Supreme Court before issuing substantive rulings on the matters now undersubmission. Joint filings are encouraged but not required. The advisories are due Tuesday December 2. Signed by Judge Xavier Rodriguez. (aej) (Entered: 11/18/2014)

12/02/2014	1288	ADVISORY TO THE COURT by Debbie Allen, Eliza Alvarado, Nina Jo Baker, Mary K. Brown, Joey Cardenas, TJ Carson, Florinda Chavez, City of Austin, Sergio Coronado, Armando Cortez, Renato De Los Santos, Dorothy DeBose, Bruce Elfant, Jessica Farrar, Pete Gallego, Baldomero Garza, David Gonzalez, Alexander Green, Nancy Hall, Jane Hamilton, Sheila Jackson-Lee, Howard Jefferson, John Jenkins, Alex Jimenez, Eddie Bernice Johnson, LULAC, Bill Lawson, Betty F Lopez, Josey Martinez, Emelda Menendez, Mexican American Legislative Caucus, Texas House of Representatives, Romeo Munoz, Richard Nguyen Le, Jose Olivares, Tomacita Olivares, Alejandro Ortiz, Rebecca Ortiz, Rudolfo Ortiz, Gregorio Benito Palomino, Balakumar Pandian, Rod Ponton, Sandra Puente, Margarita V Quesada, Elvira Rios, Wanda F. Roberts, Belen Robles, Carmen Rodriguez, Eddie Rodriguez, Gabriel Y. Rosales, Sergio Salinas, Beatrice Saloma, Alex Serna, Sandra Serna,

		Kathleen Maria Shaw, Jamaal R. Smith, Lionor Sorola-Pohlman, Marcelo H. Tafoya, Texas Latino Redistricting Task Force, Texas State Conference of NAACP Branches, Gilberto Torres, Travis County, Cynthia Valadez, Juanita Valdez-Cox, Marc Veasey, Filemon Vela, Jr., Ray Velarde, Raul Villaronga, Johnny Villastrigo, Juanita Wallace, Milton Gerard Washington, Cesar Eduardo Yevenes. (Riggs, Allison) (Entered: 12/02/2014)
12/02/2014	1289	ADVISORY TO THE COURT by Nandita Berry, Rick Perry, State of Texas. (Sweeten, Patrick) (Entered: 12/02/2014)
12/02/2014	1290	ADVISORY TO THE COURT by United States of America. (Attachments: # 1 Exhibit 1: Jurisdictional Statement, ALBC v. Alabama, # 2 Exhibit 2: Jurisdictional Statement, ADC v. Alabama, # 3 Exhibit 3: Transcript of Argument, # 4 Exhibit 4: US Brief as Amicus Curiae)(Freeman, Daniel) (Entered: 12/02/2014)
12/04/2014	1291	TRIAL BRIEF *Reply* by United States of America. (Attachments:

		# 1 Exhibit 1: Tex. 2d Am. Disclosures)(Freeman, Daniel) (Entered: 12/04/2014)
12/04/2014	1292	BRIEF regarding 1272 Trial Brief by Debbie Allen, Eliza Alvarado, Asenet T. Armadillo, Nina Jo Baker, City of Austin, Bruce Elfant, Baldomero Garza, David Gonzalez, Nancy Hall, Jane Hamilton, John Jenkins, LULAC, Betty F Lopez, Patricia Mancha, Josey Martinez, Romeo Munoz, Balakumar Pandian, Sandra Puente, Margarita V Quesada, Elvira Rios, Belen Robles, Eddie Rodriguez, Gabriel Y. Rosales, Beatrice Saloma, Alex Serna, Sandra Serna, Kathleen Maria Shaw, Jamaal R. Smith, Lionor Sorola-Pohlman, Marcelo H. Tafoya, Travis County, Bertha Urteaga, Juanita Valdez-Cox, Marc Veasey, Ray Velarde, Raul Villaronga, Johnny Villastrigo, Milton Gerard Washington. (Hicks, Max) (Entered: 12/04/2014)
12/04/2014	1293	TRIAL BRIEF *Reply* by Alexander Green, Sheila Jackson-Lee, Howard Jefferson, Eddie Bernice Johnson, Bill Lawson, Texas State Conference of NAACP Branches, Juanita

		Wallace. (Riggs, Allison) (Entered: 12/04/2014)
12/04/2014	1294	TRIAL BRIEF *(CORRECTED REPLY)* by Alexander Green, Sheila Jackson-Lee, Howard Jefferson, Eddie Bernice Johnson, Bill Lawson, Texas State Conference of NAACP Branches, Juanita Wallace. (Riggs, Allison) (Entered: 12/04/2014)
12/04/2014	1295	TRIAL BRIEF by Nandita Berry, Rick Perry, State of Texas. (Frederick, Matthew) (Entered: 12/04/2014)
12/04/2014	1296	TRIAL BRIEF *RESPONSE to Post-Trial Briefs* by Joey Cardenas, Florinda Chavez, Sergio Coronado, Armando Cortez, Renato De Los Santos, Alex Jimenez, Emelda Menendez, Jose Olivares, Tomacita Olivares, Alejandro Ortiz, Rebecca Ortiz, Rudolfo Ortiz, Gregorio Benito Palomino, Socorro Ramos, Texas Latino Redistricting Task Force, Gilberto Torres, Cynthia Valadez, Cesar Eduardo Yevenes. (Attachments: # 1 Appendix A, # 2 Appendix B)(Perales, Nina) (Entered: 12/05/2014)

03/25/2015	1301	ORDER, Plaintiffs are directed to file briefs by April 20, 2015. Defendants shall respond to Plaintiffs briefs no later than May4, 2015. Signed by Judge Xavier Rodriguez. (aej) (Entered: 03/26/2015)
04/20/2015	1302	SUPPLEMENTAL MEMORANDUM to 1301 Order by Eliza Alvarado, Asenet T. Armadillo, Nina Jo Baker, City of Austin, Bruce Elfant, Baldomero Garza, David Gonzalez, Howard Jefferson, LULAC, Bill Lawson, Betty F Lopez, Patricia Mancha, Josey Martinez, Balakumar Pandian, Elvira Rios, Belen Robles, Eddie Rodriguez, Gabriel Y. Rosales, Beatrice Saloma, Alex Serna, Sandra Serna, Lionor Sorola-Pohlman, Marcelo H. Tafoya, Texas State Conference of NAACP Branches, Travis County, Bertha Urteaga, Juanita Valdez-Cox, Ray Velarde, Raul Villaronga, Johnny Villastrigo, Juanita Wallace, Milton Gerard Washington. (Attachments: # 1 Affidavit)(Hicks, Max) (Entered: 04/20/2015)

04/20/2015	1303	BRIEF by TJ Carson, Dorothy DeBose, Jessica Farrar, Nancy Hall, Howard Jefferson, Richard Nguyen Le, Shannon Perez, Wanda F. Roberts, Carmen Rodriguez, Sergio Salinas, Gregory Tamez, Texas State Conference of NAACP Branches. (Richards, David) (Entered: 04/20/2015)
04/20/2015	1304	ADVISORY TO THE COURT by United States of America. (Freeman, Daniel) (Entered: 04/20/2015)
04/20/2015	1305	SUPPLEMENTAL MEMORANDUM to 1301 Order *Directing Plaintiffs to Identify Shaw Claims and to Assess Impact of Alabama decision* by Debbie Allen, Nancy Hall, Jane Hamilton, John Jenkins, Romeo Munoz, Sandra Puente, Margarita V Quesada, Kathleen Maria Shaw, Jamaal R. Smith, Marc Veasey. (Hebert, J.) (Entered: 04/20/2015)
04/20/2015	1306	BRIEF by Mexican American Legislative Caucus, Texas House of Representatives. (Garza, Jose) (Entered: 04/20/2015)
04/20/2015	1307	BRIEF by Alexander Green, Sheila Jackson-Lee, Eddie Bernice

		Johnson. (Bledsoe, Gary) (Entered: 04/20/2015)
04/20/2015	1308	ADVISORY TO THE COURT by Joey Cardenas, Florinda Chavez, Sergio Coronado, Armando Cortez, Renato De Los Santos, Alex Jimenez, Emelda Menendez, Jose Olivares, Tomacita Olivares, Alejandro Ortiz, Rebecca Ortiz, Rudolfo Ortiz, Gregorio Benito Palomino, Socorro Ramos, Texas Latino Redistricting Task Force, Gilberto Torres, Cynthia Valadez, Cesar Eduardo Yevenes. (Perales, Nina) (Entered: 04/20/2015)
04/23/2015	1309	BRIEF regarding 1306 Brief by Mexican American Legislative Caucus, Texas House of Representatives. (Garza, Jose) (Entered: 04/23/2015)
05/04/2015	1310	RESPONSE to 1309 Brief, 1303 Brief, 1301 Order, 1307 Brief, 1305 Supplemental Memorandum, 1308 Advisory to the Court, 1302 Supplemental Memorandum, 1306 Brief, 1304 Advisory to the Court by Nandita Berry, Rick Perry, State of Texas. (Frederick, Matthew) (Entered: 05/04/2015)
05/12/2015	1311	RESPONSE *Concerning Davis v. Abbott* to 1310 Response, by

		United States of America. (Attachments: # 1 Exhibit 1)(Freeman, Daniel) (Entered: 05/12/2015)
10/14/2015	1319	MOTION for Preliminary Injunction by Debbie Allen, Eliza Alvarado, Asenet T. Armadillo, Nina Jo Baker, TJ Carson, City of Austin, Dorothy DeBose, Bruce Elfant, Jessica Farrar, Baldomero Garza, David Gonzalez, Nancy Hall, Jane Hamilton, Howard Jefferson, John Jenkins, LULAC, Bill Lawson, Betty F Lopez, Patricia Mancha, Josey Martinez, Romeo Munoz, Richard Nguyen Le, Balakumar Pandian, Shannon Perez, Sandra Puente, Margarita V Quesada, Elvira Rios, Wanda F. Roberts, Belen Robles, Carmen Rodriguez, Eddie Rodriguez, Gabriel Y. Rosales, Sergio Salinas, Beatrice Saloma, Alex Serna, Sandra Serna, Kathleen Maria Shaw, Jamaal R. Smith, Lionor Sorola-Pohlman, Marcelo H. Tafoya, Gregory Tamez, Texas State Conference of NAACP Branches, Travis County, Bertha Urteaga, Juanita Valdez-Cox, Marc Veasey, Ray Velarde, Raul Villaronga, Johnny Villastrigo,

		Juanita Wallace, Milton Gerard Washington. (Attachments: # 1 Proposed Order)(Hicks, Max) (Entered: 10/14/2015)
10/16/2015	1320	SUPPLEMENT to 1319 MOTION for Preliminary Injunction by LULAC, Shannon Perez, Margarita V Quesada, Eddie Rodriguez, Texas State Conference of NAACP Branches. (Hicks, Max) (Entered: 10/16/2015)
10/21/2015	1321	Response in Opposition to Motion, filed by Greg Abbott, Carlos Cascos, State of Texas, re 1319 MOTION for Preliminary Injunction filed by Consol Plaintiff Travis County, Plaintiff Sergio Salinas, Consol Plaintiff Romeo Munoz, Consol Plaintiff Betty F Lopez, Consol Plaintiff Eddie Rodriguez, Intervenor Plaintiff Belen Robles, Intervenor Plaintiff Gabriel Y. Rosales, Plaintiff Sandra Puente, Plaintiff Gregory Tamez, Intervenor Plaintiff Raul Villaronga, Intervenor Plaintiff Asenet T. Armadillo, Intervenor Plaintiff Johnny Villastrigo, Plaintiff Wanda F. Roberts, Intervenor Plaintiff Bertha Urteaga, Consol Plaintiff Alex Serna, Consol Plaintiff Milton

		Gerard Washington, Consol Plaintiff Juanita Valdez-Cox, Plaintiff Shannon Perez, Plaintiff Nancy Hall, Plaintiff TJ Carson, Intervenor Plaintiff Texas State Conference of NAACP Branches, Consolidated Intervenor Plaintiff LULAC, Consol Plaintiff City of Austin, Plaintiff Jessica Farrar, Consol Plaintiff John Jenkins, Consol Plaintiff Eliza Alvarado, Consol Plaintiff Bruce Elfant, Consol Plaintiff Nina Jo Baker, Consol Plaintiff Jane Hamilton, Intervenor Plaintiff Patricia Mancha, Intervenor Plaintiff Elvira Rios, Consol Plaintiff Balakumar Pandian, Intervenor Plaintiff Marcelo H. Tafoya, Intervenor Plaintiff Ray Velarde, Consol Plaintiff Sandra Serna, Plaintiff Richard Nguyen Le, Intervenor Plaintiff Baldomero Garza, Intervenor Plaintiff Juanita Wallace, Consol Plaintiff Marc Veasey, Plaintiff Debbie Allen, Plaintiff Carmen Rodriguez, Consol Plaintiff Josey Martinez, Plaintiff Dorothy DeBose, Consol Plaintiff Margarita V Quesada, Consol Plaintiff Lionor Sorola-Pohlman, Intervenor Plaintiff Howard Jefferson, Consol Plaintiff

		Beatrice Saloma, Intervenor Plaintiff Bill Lawson, Consol Plaintiff David Gonzalez, Plaintiff Kathleen Maria Shaw, Plaintiff Jamaal R. Smith *Defendants' Response to Plaintiffs' Conditional Motion For Preliminar Injunction on Implementation of 1023 Redistricting Plans For 2016 Election Cycle* (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Colmenero, Angela) (Entered: 10/21/2015)
10/23/2015	1323	REPLY to Response to Motion, filed by Debbie Allen, Eliza Alvarado, Asenet T. Armadillo, Nina Jo Baker, TJ Carson, City of Austin, Dorothy DeBose, Bruce Elfant, Jessica Farrar, Baldomero Garza, David Gonzalez, Nancy Hall, Jane Hamilton, Howard Jefferson, John Jenkins, LULAC, Bill Lawson, Betty F Lopez, Patricia Mancha, Josey Martinez, Romeo Munoz, Richard Nguyen Le, Balakumar Pandian, Shannon Perez, Sandra Puente, Margarita V Quesada, Elvira Rios, Wanda F. Roberts, Belen Robles, Carmen Rodriguez, Eddie Rodriguez, Gabriel Y. Rosales, Sergio Salinas,

		Beatrice Saloma, Alex Serna, Sandra Serna, Kathleen Maria Shaw, Jamaal R. Smith, Lionor Sorola-Pohlman, Marcelo H. Tafoya, Gregory Tamez, Texas State Conference of NAACP Branches, Travis County, Bertha Urteaga, Juanita Valdez-Cox, Marc Veasey, Ray Velarde, Raul Villaronga, Johnny Villastrigo, Juanita Wallace, Milton Gerard Washington, re 1319 MOTION for Preliminary Injunction filed by Consol Plaintiff Travis County, Plaintiff Sergio Salinas, Consol Plaintiff Romeo Munoz, Consol Plaintiff Betty F Lopez, Consol Plaintiff Eddie Rodriguez, Intervenor Plaintiff Belen Robles, Intervenor Plaintiff Gabriel Y. Rosales, Plaintiff Sandra Puente, Plaintiff Gregory Tamez, Intervenor Plaintiff Raul Villaronga, Intervenor Plaintiff Asenet T. Armadillo, Intervenor Plaintiff Johnny Villastrigo, Plaintiff Wanda F. Roberts, Intervenor Plaintiff Bertha Urteaga, Consol Plaintiff Alex Serna, Consol Plaintiff Milton Gerard Washington, Consol Plaintiff Juanita Valdez-Cox, Plaintiff Shannon Perez, Plaintiff

		Nancy Hall, Plaintiff TJ Carson, Intervenor Plaintiff Texas State Conference of NAACP Branches, Consolidated Intervenor Plaintiff LULAC, Consol Plaintiff City of Austin, Plaintiff Jessica Farrar, Consol Plaintiff John Jenkins, Consol Plaintiff Eliza Alvarado, Consol Plaintiff Bruce Elfant, Consol Plaintiff Nina Jo Baker, Consol Plaintiff Jane Hamilton, Intervenor Plaintiff Patricia Mancha, Intervenor Plaintiff Elvira Rios, Consol Plaintiff Balakumar Pandian, Intervenor Plaintiff Marcelo H. Tafoya, Intervenor Plaintiff Ray Velarde, Consol Plaintiff Sandra Serna, Plaintiff Richard Nguyen Le, Intervenor Plaintiff Baldomero Garza, Intervenor Plaintiff Juanita Wallace, Consol Plaintiff Marc Veasey, Plaintiff Debbie Allen, Plaintiff Carmen Rodriguez, Consol Plaintiff Josey Martinez, Plaintiff Dorothy DeBose, Consol Plaintiff Margarita V Quesada, Consol Plaintiff Lionor Sorola-Pohlman, Intervenor Plaintiff Howard Jefferson, Consol Plaintiff Beatrice Saloma, Intervenor Plaintiff Bill Lawson, Consol Plaintiff David Gonzalez, Plaintiff

		Kathleen Maria Shaw, Plaintiff Jamaal R. Smith (Hicks, Max) (Entered: 10/23/2015)
11/06/2015	1324	ORDER DENYING 1319 Motion for Preliminary Injunction on Implementation of 2013 Redistricting Plans for 2016 Election Cycle. Signed by Judge Orlando L. Garcia, Judge Jerry E. Smith and Judge Xavier Rodriguez. (aej) (Entered: 11/06/2015)
04/20/2016	1329	ORDER regarding supplemental briefs. Signed by Chief Judge Orlando L. Garcia. (aej) (Entered: 04/20/2016)
05/10/2016	1330	BRIEF regarding 1329 Order by TJ Carson, Dorothy DeBose, Jessica Farrar, Nancy Hall, Richard Nguyen Le, Shannon Perez, Wanda F. Roberts, Carmen Rodriguez, Sergio Salinas, Gregory Tamez. (Attachments: # 1 Exhibit A)(Richards, David) (Entered: 05/10/2016)
05/10/2016	1331	ADVISORY TO THE COURT by Joey Cardenas, Florinda Chavez, Sergio Coronado, Armando Cortez, Renato De Los Santos, Alex Jimenez, Emelda Menendez, Jose Olivares, Tomacita Olivares,

		Alejandro Ortiz, Rebecca Ortiz, Rudolfo Ortiz, Gregorio Benito Palomino, Socorro Ramos, Texas Latino Redistricting Task Force, Gilberto Torres, Cynthia Valadez, Cesar Eduardo Yevenes. (Perales, Nina) (Entered: 05/10/2016)
05/10/2016	1332	SUPPLEMENTAL MEMORANDUM to 1329 Order by Mexican American Legislative Caucus, Texas House of Representatives. (Garza, Jose) (Entered: 05/10/2016)
05/10/2016	1333	BRIEF regarding 1329 Order by Greg Abbott, Carlos Cascos, State of Texas. (Colmenero, Angela) (Entered: 05/10/2016)
05/10/2016	1334	ADVISORY TO THE COURT by United States of America. (Freeman, Daniel) (Entered: 05/10/2016)
07/29/2016	1336	MOTION for Hearing by Debbie Allen, Eliza Alvarado, Nina Jo Baker, TJ Carson, City of Austin, Dorothy DeBose, Bruce Elfant, Jessica Farrar, Baldomero Garza, David Gonzalez, Alexander Green, Nancy Hall, Jane Hamilton, Sheila Jackson-Lee, Howard Jefferson, John Jenkins, Eddie Bernice Johnson, LULAC, Bill Lawson,

		Betty F Lopez, Patricia Mancha, Josey Martinez, Romeo Munoz, Richard Nguyen Le, Rudolfo Ortiz, Balakumar Pandian, Shannon Perez, Sandra Puente, Margarita V Quesada, Elvira Rios, Wanda F. Roberts, Belen Robles, Carmen Rodriguez, Eddie Rodriguez, Gabriel Y. Rosales, Sergio Salinas, Beatrice Saloma, Alex Serna, Sandra Serna, Kathleen Maria Shaw, Jamaal R. Smith, Lionor Sorola-Pohlman, Marcelo H. Tafoya, Gregory Tamez, Texas State Conference of NAACP Branches, Travis County, Bertha Urteaga, Juanita Valdez-Cox, Marc Veasey, Ray Velarde, Raul Villaronga, Johnny Villastrigo, Juanita Wallace, Milton Gerard Washington. (Attachments: # 1 Proposed Order)(Hicks, Max) (Entered: 07/29/2016)
12/30/2016	1337	Joint MOTION for Entry of Judgment under Rule 54(b) by Mexican American Legislative Caucus, Texas House of Representatives. (Attachments: # 1 Exhibit letter)(Garza, Jose) (Entered: 12/30/2016)

01/02/2017	1338	Amended MOTION for Entry of Judgment under Rule 54(b) by Mexican American Legislative Caucus, Texas House of Representatives. (Attachments: # 1 Exhibit, # 2 Proposed Order)(Garza, Jose) (Entered: 01/02/2017)
01/05/2017		Text Order DENYING 1338 Motion for Entry of Judgment under Rule 54(b) entered by Judge Xavier Rodriguez. This case involves a voluminous record. As movants acknowledge within this motion, "The litigants in this cause have had two trials totaling hundreds of hours of testimony and thousands of pages of exhibits and evidence. All pending issues have been briefed extensively." In terms of the record alone, this case includes: over 1300 docket entries, including pleadings, lengthy post-trial briefs, reply briefs, supplemental briefs, proposed fact findings, proposed conclusions of law, argument summaries, and Powerpoint presentations from each of the parties in this case (the post-trial briefs and proposed fact findings and conclusions of law from just two of the many parties–

		Plaintiff Latino Redistricting Task Force and Intervenor United States–total over 1,000 pages); over 10,000 pages of transcripts (including 6,850 pages of transcripts from the trials in this case, not including the interim plan proceedings or any other hearings, thirteen agreed lay witness depositions entered into evidence totaling almost 1,800 pages, and twelve agreed expert witness depositions entered into evidence totaling almost 1,400 pages); approximately 3,000 exhibits, many of which are hundreds of pages long and include numerous lengthy reports, supplemental reports, and rebuttal reports from the twenty-one expert witnesses in this case; as well as numerous disputed proposed deposition excerpts and offers of proof. The relevant case law contains too many pages to count. The Court continues to diligently work through this voluminous record and the complex legal questions presented in this case and will issue an opinion as soon as possible. (This is a text-only entry generated by the court. There is no document

		associated with this entry.) (Entered: 01/05/2017)
01/05/2017		Text Order MOOTING 1337 Motion for Entry of Judgment under Rule 54(b) entered by Judge Xavier Rodriguez. (This is a text-only entry generated by the court. There is no document associated with this entry.) (Entered: 01/05/2017)
01/05/2017		Text Order DENYING 1336 Motion for Hearing entered by Judge Xavier Rodriguez. (This is a text-only entry generated by the court. There is no document associated with this entry.) (Entered: 01/05/2017)
03/10/2017	1339	MEMORANDUM OPINION AND ORDER on Plan C185 claims. Signed by Judge Xavier Rodriguez and Chief Judge Orlando L. Garcia. Circuit Judge Smith dissenting. (Entered: 03/10/2017)
03/10/2017	1340	FINDINGS OF FACT. Signed by Judge Xavier Rodriguez and Chief Judge Orlando L. Garcia. Circuit Judge Smith dissenting. (Entered: 03/10/2017)

04/05/2017	1352	ORDER, (Status Conference set for 4/27/2017 9:30 AM before Chief Judge Orlando L. Garcia, Judge Xavier Rodriguez, and Circuit Judge Jerry E. Smith). Signed by Judge Xavier Rodriguez. (rf) (Entered: 04/05/2017)
04/12/2017	1358	MOTION *Defendants' Motion to Certify Order for Interlocutory Appeal* by Greg Abbott, Carlos Cascos. (Attachments: # 1 Proposed Order)(Sweeten, Patrick) (Entered: 04/12/2017)
04/12/2017	1359	ORDER On this date, the Court considered various pending motions. Defendants have filed a Motion to Certify Order for Interlocutory Appeal (docket no. 1358), asking the Court to certify its March 10, 2017 Order for interlocutory appeal on the issue of mootness of claims against S.B.4 (Plan C185). So that this motion will be fully briefed and ripe for discussion at the April 27, 2017 status conference, the Court ORDERS that Plaintiffs shall file their responses by 5 p.m. on Friday April 21, 2017, and Defendants shall file any reply by noon on Tuesday April 25, 2017.

		Although the Court has described the April 27 conference as an informal status conference, it will include formal argument on the Motion to Certify, which was filed after the Court issued notice of the status conference. GRANTING 1351 Motion to Withdraw as Attorney. ; GRANTING 1356 Motion to Appear Pro Hac Vice. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order.; GRANTING 1357 Motion to Appear Pro Hac Vice. Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order. Signed by Judge Xavier Rodriguez. (rf) (Entered: 04/13/2017)
04/20/2017	1364	FACT FINDINGS - PLAN H283. Signed by Chief Judge Orlando L. Garcia and Judge Xavier

		Rodriguez. (aej) Modified on 4/20/2017 to add signing judge (aej). (Entered: 04/20/2017)
04/20/2017	1365	ORDER on Plan H283. Signed by Chief Judge Orlando L. Garcia, Judge Xavier Rodriguez and Circuit Judge Jerry E. Smith dissenting. (aej) Modified on 4/24/2017 to reflect all judges(aej). (Entered: 04/20/2017)
04/21/2017	1366	Response in Opposition to Motion, filed by Debbie Allen, Eliza Alvarado, Asenet T. Armadillo, Nina Jo Baker, Mary K. Brown, Joey Cardenas, TJ Carson, Florinda Chavez, City of Austin, Sergio Coronado, Armando Cortez, Renato De Los Santos, Dorothy DeBose, Bruce Elfant, Jessica Farrar, Baldomero Garza, David Gonzalez, Alexander Green, Nancy Hall, Jane Hamilton, Gilberto Hinojosa, Sheila Jackson-Lee, Howard Jefferson, John Jenkins, Alex Jimenez, Eddie Bernice Johnson, Dr. Dottie Jones, Lyman King, LULAC, Bill Lawson, Betty F Lopez, Patricia Mancha, Josey Martinez, Emelda Menendez, Mexican American Legislative Caucus, Texas House of Representatives, Romeo Munoz,

		Richard Nguyen Le, Jose Olivares, Tomacita Olivares, Alejandro Ortiz, Rebecca Ortiz, Rudolfo Ortiz, Gregorio Benito Palomino, Balakumar Pandian, Shannon Perez, Sandra Puente, Margarita V Quesada, Socorro Ramos, Elvira Rios, Wanda F. Roberts, Belen Robles, Carmen Rodriguez, Eddie Rodriguez, Gabriel Y. Rosales, Sergio Salinas, Beatrice Saloma, Alex Serna, Sandra Serna, Kathleen Maria Shaw, Jamaal R. Smith, Lionor Sorola-Pohlman, Marcelo H. Tafoya, Gregory Tamez, Texas Democratic Party, Texas Latino Redistricting Task Force, Texas Legislative Black Caucus, Texas State Conference of NAACP Branches, Gilberto Torres, Travis County, US Congressman Henry Cuellar, Bertha Urteaga, Cynthia Valadez, Juanita Valdez-Cox, Marc Veasey, Ray Velarde, Raul Villaronga, Johnny Villastrigo, Juan Ivett Wallace, Juanita Wallace, Milton Gerard Washington, Cesar Eduardo Yevenes, re 1358 MOTION *Defendants' Motion to Certify Order for Interlocutory Appeal* filed by Defendant Carlos

		Cascos, Defendant Greg Abbott *(JOINT)* (Hebert, J.) Modified on 4/24/2017 to update filers per attorney's request(aej). (Entered: 04/21/2017)
04/21/2017	1367	RESPONSE to Motion, filed by United States of America, re 1358 MOTION *Defendants' Motion to Certify Order for Interlocutory Appeal* filed by Defendant Carlos Cascos, Defendant Greg Abbott (Freeman, Daniel) (Entered: 04/21/2017)
04/27/2017	1381	Minute Entry for proceedings held before Chief Judge Orlando L. Garcia: Status Conference held on 4/27/2017 (Minute entry documents are not available electronically.). (Court Reporter Karl Myers, Pam Andalosa, Chris Poage.)(aej) (Entered: 04/27/2017)
05/01/2017	1385	ORDER DENYING 1358 Motion to Certify Order for Interlocutory Appeal. Signed by Judge Jerry E. Smith, Chief Judge Orlando L. Garcia and Judge Xavier Rodriguez. (aej) (Entered: 05/01/2017)
05/01/2017	1387	ORDER GRANTING IN PART AND DENYING IN PART 996 Motion for Summary

		Judgment. Signed by Judge Xavier Rodriguez, Chief Judge Orlando L. Garcia and Judge Jerry E. Smith (aej) (Entered: 05/01/2017)
05/01/2017	1389	SCHEDULING ORDER: Trial set for July 10, 2017. (Entered: 05/01/2017)
05/02/2017	1390	AMENDED ORDER on Plan C185. Signed by Chief Judge Orlando L. Garcia and Judge Xavier Rodriguez and Judge Jerry E. Smith dissenting. (aej) Modified on 5/3/2017 (aej). (Entered: 05/02/2017)
05/03/2017		Notice of Correction:***NOTIFIED COUNSEL THAT ENTRY HAS BEEN EDITED TO REFLECT CORRECT SIGNING JUDGES*** re 1390 Order. (aej) (Entered: 05/03/2017)
05/22/2017	1395	ORDER for supplemental briefing. Signed by Judge Xavier Rodriguez on behalf of the panel. (Entered: 05/22/2017)
05/25/2017	1397	ADVISORY TO THE COURT by Greg Abbott, Carlos Cascos. (Sweeten, Patrick) (Entered: 05/25/2017)

06/06/2017	1411	BRIEF regarding 1395 Order by US Congressman Henry Cuellar. (Rios, Rolando) (Entered: 06/06/2017)
06/06/2017	1412	ADVISORY TO THE COURT by TJ Carson, Dorothy DeBose, Jessica Farrar, Nancy Hall, Richard Nguyen Le, Shannon Perez, Wanda F. Roberts, Carmen Rodriguez, Sergio Salinas, Gregory Tamez. (Richards, David) (Entered: 06/06/2017)
06/06/2017	1413	BRIEF by Greg Abbott, State of Texas. (Sweeten, Patrick) (Entered: 06/06/2017)
06/06/2017	1414	BRIEF by Debbie Allen, Jane Hamilton, John Jenkins, Lyman King, Romeo Munoz, Sandra Puente, Margarita V Quesada, Kathleen Maria Shaw, Jamaal R. Smith, Marc Veasey. (Hebert, J.) (Entered: 06/06/2017)
06/06/2017	1415	BRIEF by Eliza Alvarado, Nina Jo Baker, Bruce Elfant, David Gonzalez, Betty F Lopez, Josey Martinez, Balakumar Pandian, Eddie Rodriguez, Beatrice Saloma, Alex Serna, Sandra Serna, Lionor Sorola-Pohlman, Juanita Valdez-Cox, Milton Gerard

		Washington. (Spiva, Bruce) (Entered: 06/06/2017)
06/06/2017	1416	BRIEF by Joey Cardenas, Florinda Chavez, Sergio Coronado, Armando Cortez, Renato De Los Santos, Alex Jimenez, Emelda Menendez, Jose Olivares, Tomacita Olivares, Alejandro Ortiz, Rebecca Ortiz, Rudolfo Ortiz, Gregorio Benito Palomino, Socorro Ramos, Texas Latino Redistricting Task Force, Gilberto Torres, Cynthia Valadez, Cesar Eduardo Yevenes. (Perales, Nina) (Entered: 06/06/2017)
07/02/2017	1445	STIPULATION *of Facts No. 2 Regarding Quesada Plaintiffs' Residency between Quesada Plaintiffs and Defendants* by Debbie Allen, Jane Hamilton, John Jenkins, Lyman King, Romeo Munoz, Sandra Puente, Margarita V Quesada, Kathleen Maria Shaw, Jamaal R. Smith, Marc Veasey. (Hebert, J.) (Entered: 07/02/2017)
07/10/2017	1483	Minute Entry for proceedings held before Chief Judge Orlando L. Garcia, Judge Xavier Rodriguez and Circuit Judge Jerry E. Smith: Bench Trial begun on 7/10/2017 (Minute entry documents are not

		available electronically.), Bench Trial held on 7/10/2017 (Minute entry documents are not available electronically.) (Court Reporter Leticia Rangel/Chris Poage.)(aej) (Entered: 07/11/2017)
07/11/2017	1486	Minute Entry for proceedings held before Chief Judge Orlando L. Garcia, Xavier Rodriguez and Circuit Judge Jerry E. Smith: Bench Trial held on 7/11/2017 (Minute entry documents are not available electronically.), Set Motion Hearing for 1482 Opposed MOTION to Compel *(Emergency Motion to Compel re: Late-Served Privilege Log)* (Motion Hearing set for 7/12/2017 08:00 AM before Chief Judge Orlando L. Garcia, Xavier Rodriguez and Circuit Judge Jerry E. Smith). (Court Reporter Leticia Rangel/Chris Poage.)(aej) (Entered: 07/12/2017)
07/12/2017	1491	Minute Entry for proceedings held before Chief Judge Orlando L. Garcia, Judge Xavier Rodriguez and Circuit Judge Jerry E. Smith: Bench Trial held on 7/12/2017 (Minute entry documents are not available electronically.). (Court Reporter Leticia Rangel/Chris Poage.)(aej) (Entered: 07/13/2017)

07/13/2017	1493	Minute Entry for proceedings held before Chief Judge Orlando L. Garcia, Judge Xavier Rodriguez and Circuit Judge Jerry E. Smith: Bench Trial held on 7/13/2017 (Minute entry documents are not available electronically.). (Court Reporter Leticia Rangel/Chris Poage.)(aej) (Entered: 07/14/2017)
07/14/2017	1494	Questions from the Three-Judge Panel to be Addressed at the Conclusion of Trial. Signed by Judge Xavier Rodriguez, Chief Judge Orlando Garcia and Circuit Judge Jerry E. Smith. (aej) (Entered: 07/14/2017)
07/14/2017	1498	Minute Entry for proceedings held before Chief Judge Orlando L. Garcia, Judge Xavier Rodriguez and Circuit Judge Jerry Smith: Bench Trial held on 7/14/2017 (Minute entry documents are not available electronically.). (Court Reporter Leticia Rangel/Chris Poage.)(aej) (Entered: 07/17/2017)
07/15/2017	1499	Minute Entry for proceedings held before Chief Judge Orlando L. Garcia, Judge Xavier Rodriguez and Circuit Judge Jerry E. Smith: Bench Trial held on 7/15/2017 (Minute entry documents are not

		available electronically.), Bench Trial completed on 7/15/2017 (Minute entry documents are not available electronically.). (Court Reporter Leticia Rangel/Chris Poage.)(aej) Modified on 7/17/2017 (aej). (Entered: 07/17/2017)
07/31/2017	1522	MOTION for Leave to File Amicus Brief*Post-Trial* by Terry L. Scarborough. by Helen Delavan, Ruben Vasquez Falcon, Heriberto Gonzalez, Sylvia Miluska Gonzalez, Timothy Hardt, William Ballard Hurd. (Attachments: # 1 Exhibit Exhibit, # 2 Proposed Order Proposed Order)(Scarborough, Terry) (Entered: 07/31/2017)
07/31/2017		Text Order GRANTING 1522 Motion for Leave to File Amicus Brief entered by Judge Xavier Rodriguez. (This is a text-only entry generated by the court. There is no document associated with this entry.) (Entered: 07/31/2017)
07/31/2017	1524	TRIAL BRIEF by Eliza Alvarado, Asenet T. Armadillo, Nina Jo Baker, City of Austin, Dorothy DeBose, Bruce Elfant, Baldomero Garza, David Gonzalez, Nancy

		Hall, LULAC, Betty F Lopez, Patricia Mancha, Josey Martinez, Rudolfo Ortiz, Balakumar Pandian, Shannon Perez, Elvira Rios, Belen Robles, Carmen Rodriguez, Eddie Rodriguez, Gabriel Y. Rosales, Sergio Salinas, Beatrice Saloma, Alex Serna, Sandra Serna, Lionor Sorola-Pohlman, Marcelo H. Tafoya, Gregory Tamez, Travis County, Bertha Urteaga, Juanita Valdez-Cox, Ray Velarde, Johnny Villastrigo, Milton Gerard Washington. (Hicks, Max) (Entered: 07/31/2017)
07/31/2017	1525	TRIAL BRIEF *Post Trial Brief* by Mexican American Legislative Caucus, Texas House of Representatives. (Garza, Jose) (Entered: 07/31/2017)
07/31/2017	1526	TRIAL BRIEF *Defendants' Post-Trial Brief* by Greg Abbott, Rolando Pablos, State of Texas. (Sweeten, Patrick) (Entered: 07/31/2017)
07/31/2017	1527	TRIAL BRIEF *(Quesada Plaintiffs)* by Debbie Allen, Jane Hamilton, John Jenkins, Lyman King, Romeo Munoz, Sandra Puente, Margarita V Quesada,

		Kathleen Maria Shaw, Jamaal R. Smith, Marc Veasey. (Attachments: # 1 Appendix 1: Quesada Plaintiffs' Answers to Court's Questions)(Gaber, Mark) (Entered: 07/31/2017)
07/31/2017	1528	TRIAL BRIEF *The African-American Congresspersons Plaintiff-Intervenors' Post-Trial Brief* by Alexander Green, Sheila Jackson-Lee, Eddie Bernice Johnson. (Attachments: # 1 Appendix Appendix A)(Bledsoe, Gary) (Entered: 07/31/2017)
07/31/2017	1529	TRIAL BRIEF by Howard Jefferson, Bill Lawson, Texas State Conference of NAACP Branches. (Attachments: # 1 Appendix A: Additional Answers to the Court's Questions)(Riggs, Allison) (Entered: 07/31/2017)
07/31/2017	1531	POST-TRIAL AMICI CURIAE BRIEF by Helen Delavan, Ruben Vasquez Falcon, Heriberto Gonzalez, Sylvia Miluska Gonzalez, Timothy Hardt, William Ballard Hurd. (rf) (Entered: 08/01/2017)
08/01/2017	1530	TRIAL BRIEF *Findings of Fact and Conclusions of Law* by Joey

		Cardenas, Florinda Chavez, Sergio Coronado, Armando Cortez, Alex Jimenez, Emelda Menendez, Jose Olivares, Tomacita Olivares, Alejandro Ortiz, Rebecca Ortiz, Socorro Ramos, Texas Latino Redistricting Task Force, Gilberto Torres, Cynthia Valadez, Cesar Eduardo Yevenes. (Attachments: # 1 Exhibit 68, # 2 Exhibit 69, # 3 Exhibit 70)(Perales, Nina) (Entered: 08/01/2017)
08/07/2017	1533	ORDER AND ADVISORY. Signed by Judge Xavier Rodriguez. (Entered: 08/07/2017)
08/08/2017	1534	ADVISORY TO THE COURT by Greg Abbott, Rolando Pablos, State of Texas. (Bitter, Adam) (Entered: 08/08/2017)
08/15/2017	1535	ORDER on Plan C235. Signed by Judge Xavier Rodriguez, Chief Judge Orlando Garcia and Circuit Judge Jerry E. Smith. (aej) (Entered: 08/15/2017)
08/18/2017	1536	Appeal of Order entered by District Judge 1535 by Greg Abbott, Rolando Pablos, State of Texas. (Filing fee $ 505 receipt number 0542-9895805) (Sweeten, Patrick) (Entered: 08/18/2017)

08/18/2017	1538	Opposed MOTION to Stay *Order on Plan C235 Pending Appeal of That Order or a Final Judgment* by Greg Abbott, Rolando Pablos, State of Texas. (Attachments: # 1 Proposed Order)(Sweeten, Patrick) (Entered: 08/18/2017)
08/18/2017		Text Order DENYING 1538 Motion to Stay entered by Judge Xavier Rodriguez on behalf of the unanimous panel. The motion to stay pending appeal is denied. Although the Court found violations in Plan C235, the Court has not enjoined its use for any upcoming elections. The parties are ordered to proceed with preparations for the remedial hearing as previously directed. (This is a text-only entry generated by the court. There is no document associated with this entry.) (Entered: 08/18/2017)
08/24/2017	1540	ORDER on Plan H358. Signed by Judge Xavier Rodriguez, Chief Judge Orlando Garcia and Circuit Judge Jerry E. Smith. (aej) Modified on 8/24/2017 to include all judges (aej). (Entered: 08/24/2017)

08/28/2017	1548	ADVISORY. Signed by Judge Xavier Rodriguez, Chief Judge Orlando Garcia and Circuit Judge Jerry E. Smith. (aej) Modified signing judges on 8/28/2017 (aej). (Entered: 08/28/2017)
08/28/2017	1549	Appeal of Order entered by District Judge 1540 by Greg Abbott, Rolando Pablos, State of Texas. (Filing fee $ 505 receipt number 0542-9924294). Attorney Angela V. Colmenero added to party Rolando Pablos(pty:dft) (Colmenero, Angela) (Entered: 08/28/2017)
08/28/2017	1550	Opposed MOTION to Stay *Order on Plan H358 Pending Appeal of That Order or a Final Judgment* by Greg Abbott, Rolando Pablos, State of Texas. (Attachments: # 1 Exhibit Exhibit 1, # 2 Proposed Order) (Colmenero, Angela) (Entered: 08/28/2017)
08/28/2017		Text Order DENYING 1550 Motion to Stay entered by Judge Xavier Rodriguez on behalf of the unanimous panel. The motion to stay pending appeal is denied. Although the Court found violations in Plan H358, the Court

		has not enjoined its use for any upcoming elections. The parties are ordered to proceed with preparations for the remedial hearing as previously directed. (This is a text-only entry generated by the court. There is no document associated with this entry.) (Entered: 08/28/2017)
08/28/2017	1551	SUPREME COURT ORDER - IT IS ORDERED that the order of the United States District Court for the Western District of Texas, case No. SA-11-CV-360, entered August 15, 2017, is hereby stayed pending receipt of a response, due on or before Tuesday, September 5, 2017, by 3 p.m., and further order of the undersigned or of the Court. Signed by Associate Justice Samuel A Alito, Jr. (aej) (Entered: 08/29/2017)
09/01/2017	1553	ADVISORY. In accordance with Justice Alito's stay orders, there will be no hearings on September 5 or September 6, 2017. Signed by Judge Xavier Rodriguez. (Entered: 09/01/2017)
09/13/2017	1559	SUPREME COURT ORDER, The application for stay presented to Justice Alito and byhim

		referred to the Court is granted, and it is ordered that the order of the United States District Court for the Western District of Texas, case No. SA-11-CV-360, entered August 15, 2017, is stayed pending the timely filing and disposition of an appeal to this Court. Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application. Signed by Justice Alito. (aej) Modified docket text on 9/13/2017 (aej). (Entered: 09/13/2017)
09/13/2017	1560	SUPREME COURT ORDER, The application for stay presented to Justice Alito and by him referred to the Court is granted, and it is ordered that the order of the United States District Court for the Western District of Texas, case No. SA-11-CV-360, entered August 24, 2017, is stayed pending the timely filing and disposition of an appeal to this Court. Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application. Signed by Justice Alito. (aej) Modified docket text on 9/13/2017 (aej). (Entered: 09/13/2017)

09/14/2017	1561	Appeal of Order entered by District Judge 886, 1430, 1535, 1540, 285, 1104 by Gilberto Hinojosa, Texas Democratic Party. (Filing fee $ 505 receipt number 0542-9982017) (Dunn, Chad) (Entered: 09/14/2017)
09/14/2017	1562	Appeal of Order entered by District Judge 1535 by Mexican American Legislative Caucus, Texas House of Representatives. No filing fee submitted (Garza, Jose) (Entered: 09/14/2017)
09/14/2017	1563	Appeal of Order entered by District Judge 1535 by Joey Cardenas, Florinda Chavez, Sergio Coronado, Armando Cortez, Renato De Los Santos, Alex Jimenez, Jose Olivares, Tomacita Olivares, Alejandro Ortiz, Rebecca Ortiz, Gregorio Benito Palomino, Socorro Ramos, Gilberto Torres, Cynthia Valadez, Cesar Eduardo Yevenes. No filing fee submitted (Perales, Nina) (Entered: 09/14/2017)
09/14/2017	1564	Joint Appeal of Order entered by District Judge 1535, 285 by Debbie Allen, Asenet T. Armadillo, Baldomero Garza, Jane Hamilton,

		John Jenkins, Lyman King, LULAC, Patricia Mancha, Romeo Munoz, Sandra Puente, Margarita V Quesada, Elvira Rios, Belen Robles, Gabriel Y. Rosales, Kathleen Maria Shaw, Jamaal R. Smith, Marcelo H. Tafoya, Bertha Urteaga, Marc Veasey, Ray Velarde, Raul Villaronga, Johnny Villastrigo. (Filing fee $ 505 receipt number 0542-9982179) (Gaber, Mark) (Entered: 09/14/2017)
09/14/2017	1565	Joint Appeal of Order entered by District Judge 1535 by Alexander Green, Sheila Jackson-Lee, Howard Jefferson, Eddie Bernice Johnson, Bill Lawson, Texas State Conference of NAACP Branches. (Filing fee $ 505 receipt number 0542-9982181) (Riggs, Allison) (Entered: 09/14/2017)
09/25/2017	1566	Appeal of Order entered by District Judge 1540 by Mexican American Legislative Caucus, Texas House of Representatives. No filing fee submitted (Garza, Jose) (Entered: 09/25/2017)
09/25/2017	1567	Appeal of Order entered by District Judge 1540 by Joey

		Cardenas, Florinda Chavez, Sergio Coronado, Armando Cortez, Renato De Los Santos, Alex Jimenez, Emelda Menendez, Alejandro Ortiz, Rebecca Ortiz, Gregorio Benito Palomino, Socorro Ramos, Texas Latino Redistricting Task Force, Gilberto Torres, Cynthia Valadez, Cesar Eduardo Yevenes. No filing fee submitted (Perales, Nina) (Entered: 09/25/2017)
09/25/2017	1568	Appeal of Order entered by District Judge 1540 by Howard Jefferson, Bill Lawson, Texas State Conference of NAACP Branches. (Filing fee $ 505 receipt number 0542-10014603) (Maffetore, Jaclyn) (Entered: 09/25/2017)
09/27/2017	1569	Appeal of Order entered by District Judge 886, 1535, 285, 1104 by John T Morris.*Pro Se* (Morris, John) (Entered: 09/27/2017)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, *et al.*,	)	
	)	CIVIL
Plaintiffs,	)	ACTION NO.
	)	SA-11-CA-360-
v.	)	OLG-JES-XR
	)	[Lead case]
STATE OF TEXAS, *et al.*,	)	
	)	
Defendants.	)	
	)	
	)	
JOHN T. MORRIS,	)	CIVL
	)	ACTION NO.
Plaintiff,	)	SA-11-CA-615-
	)	OLG-JES-XR
v.	)	[Consolidated
	)	case]
STATE OF TEXAS, et al.,	)	
	)	
Defendants.	)	
	)	
	)	
TEXAS LATINO	)	
REDISTRICTING	)	CIVIL
TASK FORCE, et al.,	)	ACTION NO.
	)	SA-11-CV-490-
Plaintiffs,	)	OLG-JES-XR
	)	[Consolidated
v.	)	case]

RICK PERRY,	)	
	)	
Defendant.	)	
	)	
MARAGARITA V. QUESADA, et al.,	)	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
RICK PERRY, et al.,	)	
	)	
Defendants	)	
	)	
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC),	)	CIVIL ACTION NO. SA-11-CA-361-OLG-JES-XR [Consolidated case]
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
STATE OF TEXAS, et al.,	)	
	)	
Defendants.	)	
	)	
EDDIE RODRIGUEZ, et al.	)	CIVIL ACTION NO. SA-11-CA-635-OLG-JES-XR
	)	
Plaintiffs,	)	
	)	

v.	)	[Consolidated
	)	case]
RICK PERRY, et al.,	)	
	)	
Defendants.	)	

PLAINTIFF'S JOHN MORRIS' OPPOSED SECOND AMENDED COMPLAINT

COME NOW Plaintiff John T. Morris, a qualified voter of the State of Texas and resident of Harris County in said state brings this AMENDED action on behalf of himself in respect to the 2011 redistricting maps and the newly enacted 2013 redistricting maps. It is this plaintiff's contention that these maps that are drawn in a manner, that do not follow accepted proper district boundary criteria, create logistical and geographic distortions and informational complications that place a burden on the plaintiff's first amendment speech, press and assembly rights and are an "imposition on fundamental constitutional rights" (Speiser v. Randall, 357 U.S. 523), and the plaintiff's right to vote and all of which are protected by the United States Constitution and the fourteenth amendment which guarantees these same rights to the citizens of the states. And the plaintiff further contends that the 2013 maps in particular represent mid-decennial redistricting which also violates these same above mentioned rights in that mid-decennial redistricting adds an element of uncertainty into the utility of this plaintiff's rights. And the plaintiff further contends that this right to vote for the candidate of his choice is violated when redistricting removes a candidate from his reach unnecessarily. And the plaintiff further

contends that a standard in which to recognize these burdens on this plaintiff's rights are easily ascertained in the observation of the departure from accepted district map criteria where the greater the departure from these criteria the greater the burden on a voter's rights and in order to allow voters who have voted for a candidate in a previous election are allowed to vote in the subsequent election, and not abandon their first amendment historical experiences in respect to the incumbent, the state must redistrict in such a manner as to allow as many voters as possible who have voted for or against an incumbent in a previous election to vote again for or against this same incumbent; a departure from which would be easily recognized when a district that may conform to accepted criteria is shifted markedly to a new location.

I. JURISDICTION & VENUE

1. Plaintiff's complaint raises questions arising under the United States Constitution and state and federal law.

2. This court has original jurisdiction pursuant to 28 U.S.C. Sections 1331, 1343 (a)(3) and (4) and 1357; and 42 U.S.C. Section 1983 and 1988.

3. This courts jurisdiction is invoked pursuant to 28 U.S.C. Section 1391 (b).

4. Plaintiff's claim for declaratory and injunctive relief is authorized by 28 U.S.C. Sections 2201 and 2202.

5. Plaintiff requests a three-judge panel pursuant to 28 U.S.C. Section 2284.

II. PARTIES

6. Plaintiff John T Morris is a naturalized citizen of the United States and registered voter and resides in Harris County of the State of Texas within the jurisdiction of the U.S. District Court – Southern District of Texas, and has standing to bring this action under 42 U.S.C. Section 1983.

7. Defendants are the State of Texas and the officials thereof who have duties and responsibilities under the laws of the state to redistrict congressional districts following the decennial census.

8. Defendant Rick Perry is the Governor of the State of Texas and under Article IV, Section 1, of the Constitution of the State of Texas, is the chief executive officer of the Defendant State of Texas. He is sued in his official capacity.

9. Defendant John Steen is the Secretary of State for the State of Texas and is responsible under the laws of the state to oversee the conduct of elections. He is sued in his official capacity.

III. FACTS

10. After the decennial Census, which is used to provide for the reapportionment of the U.S. House of Representatives, the State of Texas, as well as the other 50 states, must redraw district boundaries in accordance with changes in population densities and/or increases or decreases in the number of apportioned representatives. On the 1st of June, 2011, the Houston Chronicle reported "After five months and almost no public debate, the House and Senate redistricting committee chairs have finally

released a joint map for congressional redistricting". The Texas legislature enacted redistricting plans that were presented to both the Texas House of representatives and the Texas Senate.

14. The plaintiff, John T. Morris, is a citizen and registered voter in the 2nd Congressional district and resides and is domiciled in Harris County, Texas and his home address is 5703 Caldicote St., Humble, Texas 77346.

15. Due to the unexplained secrecy with which the House and Senate redistricting committees conducted the process of redrawing the new congressional map the plaintiff came late to understand that the 2nd Congressional district had been altered drastically. Whereas the 2nd district included all of Jefferson county and the greater part of Liberty county, the district is now entirely within Harris county and has lost approximately one-half of the area it formerly covered to the East of the city of Houston and is now enlarged to West of the city of Houston.

16. On July 20, 2011 this complaint and a number of others were consolidated into Perez v. Perry, SA-11-CA-360 and set in San Antonio.

17. On August 17, 2011 State of Texas defendant filed a motion to dismiss this claim based on standing, a nonjusticiable political question and subject matter jurisdiction (Dk# 209).

18. On September 2nd, 2011 after opposing briefs were filed court granted State's motion to dismiss the claim

filed by Plaintiff John T. Morris stating that "Mr. Morris does not propose any standard by which to measure such a burden,"(Dkt. #285 in 11-CA- 360).

19. On October 3rd, 2011 Court grants motion for reconsideration (Dkt. #388) by Texas Democratic Party and Boyd Richie (Dkt. #384) which was also joined by John T. Morris (Dkt. #386).

20. After elections based on interim maps, A D.C. Court opinion and a number of appeals to the Supreme Court the Texas legislature abandoned its 2011 enacted maps and on June 26, 2013 adopted the interim maps drawn for the 2012 election as the states permanent maps.

21. District 2 of the Congressional map in the newly enacted map is roughly the same as in the 2011 Congressional map and is consequently also drastically different from the map used prior to 2011.

22. On July 1, 2013, in a hearing, the Court dismissed the State's motion to dismiss the consolidated case SA-11-CA-360 and in an order gave parties the option to file amended claims.

23. Article I, Section 2 of the United States Constitution calls for representatives to be "composed of Members to be chosen every Second year by the people...". The purpose of having elections every two years for the U.S. House of Representatives, as clearly stated by the framers of the Constitution in the Federalist papers and elsewhere, is to provide the people with "frequent elections," which is based on the First

Amendment rights of freedom of speech, freedom of the press and the right of assembly, in order to allow these representative's constituents to appraise the performance of the said representatives in order to ascertain whether they wished to vote for them once again.

24. The changes made to the district boundaries by the Republican dominated legislature are based on a stated partisan desire to add voters who are known to be sympathetic to Republican candidates and their political views. This gerrymandering of the district boundaries has the effect of swamping out the countervailing political voices of those who voted in the previous election and who have been represented by the Congressman and are familiar with his performance and is an imposition on the First Amendment rights of the voter.

25. Gerrymandering is carried out with an indifference to the democratic principle of "frequent elections" which is based on the First Amendment speech, press and assembly rights of the voters. Gerrymandering will allow the representative to return to the 2nd district after new district lines have been drawn and effectively be appraised, to a large extent, by a new majority of sympathetic partisan voters who will be largely unfamiliar with the representative and his performance during the previous term.

26. Gerrymandering further undermines the fact of a representative being elected only every two years when the representative's party has drawn the lines of the representative's district. The Republican party, in this case, states openly that they are selecting new boundaries

in order to incorporate voters into the newly formed districts to give Republican representatives a near certain probability of being reelected. The principle of "frequent elections" and the First Amendment rights that it is based upon in respect to the right to vote is negated since the whole purpose of the Texas Republican party's effort is to, in effect, guarantee four year terms for its fellow congressional party members immediately after the redistricting and obviously also to increase these guaranteed elections for as many years as possible.

27. The plaintiff asks the Court to intervene in the redistricting process and prevent the the Texas legislature and governor from adopting the interim maps and changing the plaintiff's district boundaries as little as possible and only to the extent necessary to accommodate the four new districts apportioned to the state of Texas in accordance with the 2010 census. And in so doing prevent the Republican controlled government of Texas from undermining the purposes of Article I, Section 2, Clause 1 of the U.S. Constitution requiring frequent elections which is based on First Amendment principles and in effect abridging the plaintiff's right to an effective political voice in respect to his representative's candidacy for a new term in the U.S. House of Representatives.

28. The newly enacted 2013 maps are in effect mid-decennial maps and once again are enacted based on partisan interests and fail in respect to First Amendment rights in the same manner as the 2011 maps.

29. Mid-decennial maps that are drawn at the will of the State and with partisan objectives can and will create

uncertainties for voters who wish to continue to vote for or against their incumbent representative in respect to First Amendment rights that are embedded in the "frequent election" principle.

30. The deviations from respected and accepted district map criteria are directly related to First Amendment rights in the sense that the greater the deviation the greater the imposition on these First Amendment rights of freedom of speech, freedom of the press and freedom of assembly. And when a district, though it conforms to accepted criteria, is wholly relocated noticeably for no justifiable reason this to constitutes an imposition on the First Amendment rights of the voter in respect to the principle of frequent elections where the voter uses his or her political knowledge and experiences to assess the performance of his or her incumbent in a subsequent election.. These facts and an assessment as to how many voters are allowed to vote in subsequent elections who voted in previous elections creates an easily ascertained standard by which to measure the burden on the rights of the voters in respect to partisan gerrymandering.

31. Since the motion for reconsideration is still pending the facts 23 through 30 constitute in addition to their common purpose a restating of the plaintiff's pleading to be preserved on appeal.

IV CAUSES OF ACTION

First Cause of Action:

30.. Plaintiff realleges and incorporates paragraphs 1-29.

31. Plaintiff claims a violation of his First Amendment rights to political speech, freedom of the press and right of assembly as guaranteed by the 14th Amendment.

Second Cause of Action:

32. Plaintiff realleges and incorporates paragraphs 1-29.

33. Plaintiff claims a violation of his First Amendment right to a fair and effective vote as guaranteed by the 14th Amendment.

Third Cause of Action:

34. Plaintiff realleges and incorporates paragraphs 1-29.

35. Plaintiff claims that facts set forth above demonstrate a violation of the intent of Section 2, of Article I of the United States Constitution.

V PRAYER FOR RELIEF

In light of the foregoing facts and claims, the plaintiff respectfully requests the following relief:

A. That the court request the convening of a three-judge court pursuant to 28 U.S.C. Section 2284.

B. Declare the current 2013 plan for the Texas Congressional districts to be unconstitutional and enjoin its use in any further elections.

C. Grant plaintiff reasonable fees and costs pursuant to 28 U.S.C. Section 2412..

D. Grant such other relief as may be necessary and proper.

/s/ John T. Morris
John T. Morris
5703 Caldicote St.
Humble, TX 77346
281-852-6388

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, HAROLD DUTTON, JR. and GREGORY TAMEZ,	)	
Plaintiffs	)	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]
v.	)	
STATE OF TEXAS; RICK PERRY, in his official capacity as Governor of the State of Texas; DAVID DEWHURST, in his Official capacity as Lieutenant Governor of the State of Texas; JOE STRAUS, in his official Capacity as Speaker of the Texas House of Representatives; JOHN STEEN, in his official capacity as Secretary of the State of the State of Texas,	)	
Defendants	)	
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC),	)	

Plaintiffs	)	CIVIL
	)	ACTION No.
v.	)	SA-11-CA-
	)	361-OLG-JES
STATE OF TEXAS; RICK	)	XR
PERRY, in his official capacity	)	[Consolidated
as Governor of the State of	)	case]
Texas; DAVID DEWHURST, in	)	
his official capacity as Lieutenant	)	
Governor of the State of Texas;	)	
JOE STRAUS, in his official	)	
capacity as Speaker of the Texas	)	
House of Representatives,	)	
	)	
Defendants	)	
	)	
	)	
TEXAS LATINO	)	
REDISTRICTING TASK	)	
FORCE, JOEY CARDENAS,	)	
ALEX JIMENEZ, EMELDA	)	
MENENDEZ, TOMACITA	)	
OLIVARES, JOSE OLIVARES,	)	
ALEJANDRO ORTIZ,	)	
REBECCA ORTIZ,	)	
FLORINDA CHAVEZ,	)	
ARMANDO CORTEZ, CESAR	)	
EDUARDO YEVENES,	)	
GREGORIO BENITO	)	
PALOMINO, RENATO DE	)	
LOS SANTOS, GILBERTO	)	
TORRES, SOCORRO RAMOS,	)	
SERGIO CORONADO and	)	

CYNTHIA VALADEZ,	)	
	)	
Plaintiffs	)	CIVIL
	)	ACTION NO.
v.	)	SA-11-CA-
	)	490-OLG-JES-
RICK PERRY, in his official capacity as Governor of the State of Texas; HOPE ANDRADE, in her official capacity as Secretary of State of the State of Texas,	)	XR
	)	[Consolidated
	)	case]
	)	
	)	
Defendants	)	

FOURTH AMENDED COMPLAINT OF PLAINTIFFS TEXAS LATINO REDISTRICTING TASK FORCE, ET AL.

TO THE HONORABLE UNITED STATES DISTRICT COURT:

I. INTRODUCTION

1. Plaintiffs are an association and individual registered voters that seek, on behalf of themselves and their members, declaratory and injunctive relief to enforce the Fourteenth and Fifteenth Amendments to the United States Constitution and the Voting Rights Act of 1965.

2. Plaintiffs seek a declaratory judgment that the 2011 Texas congressional (Plan C185) and Texas House of Representatives (Plan H283) redistricting plans and

the alterations made to House District (HD) 90 in the 2013 Texas House of Representatives redistricting plan (Plan H358) violate their civil rights by unlawfully diluting the voting strength of Latinos. Plaintiffs further seek a declaratory judgment that the 2011 Texas congressional and Texas House of Representatives redistricting plans and the alterations made to HD 90 in Plan H358 discriminate against them on the basis of race and national origin. Plaintiffs seek a permanent injunction prohibiting the calling, holding, supervising or certifying of any future congressional or Texas House elections under the 2011 redistricting plans or the 2013 Texas House of Representatives redistricting plan. Plaintiffs seek the creation of congressional and Texas House redistricting plans that will not cancel out, minimize or dilute the voting strength of Latino voters in Texas. Plaintiffs fu rther seek an order subjecting Texas to the preclearance requirement of section 5 of the Voting Rights Act under 42 U.S.C. § 1973a(c) (section 3(c) of the Voting Rights Act). Plaintiffs also seek costs and attorneys' fees.

II.
JURISDICTION

3. Jurisdiction is based upon 28 U.S.C. 1343a (3) & (4) and upon 28 U.S.C. 1331 for causes of action arising from 42 U.S.C. 1973 and 1973c. Jurisdiction for Plaintiffs' claim for declaratory relief is based upon 28 U.S.C. 2201 and 2202. Jurisdiction for Plaintiffs' claims under the Fourteenth and Fifteenth Amendments to the U.S. Constitution is based upon 42 U.S.C. Section 1983 and 28 U.S.C. 1331. Jurisdiction for Plaintiffs' claim for attorney's fees is based on 42 U.S.C. Sections 19731(e)

and 1988. Venue is proper in this court under 28 U.S.C. 1391(b).

III.
PLAINTIFFS

4. Plaintiff TEXAS LATINO REDISTRICTING TASK FORCE is an unincorporated association of individuals and organizations committed to securing fair redistricting plans for Texas. Organizational members of the Texas Latino Redistricting Task Force include Hispanics Organized for Political Education (HOPE), the Mexican American Bar Association of Texas, the National Organization for Mexican American Rights, Southwest Voter Registration Education Project, the William C. Velasquez Institute, and Southwest Workers' Union. Individuals who are members of the Task Force member organizations include: Latino registered voters of Texas who are injured by the dilution of Latino voting strength statewide; Latino registered voters of Texas who reside in areas where Latino voting strength has been diluted by redistricting plans H283, C185 and H358; Latino registered voters of Texas who reside in districts that were subjected to race-based redistricting in violation of their rights; and Latino registered voters of Texas who reside in areas where Latino-majority districts should have been created but were not in plans H283 and C185.

5. Plaintiff Joe Cardenas III is Latino and a registered voter of Texas. He resides in Louise, Texas. In plans H283, C185 and H358, Plaintiff Cardenas resides in Texas House District 85 and Congressional District 27.

6. Plaintiff Florinda Chavez is Latina and a registered voter of Texas. She resides in Austin, Texas. In plans H283, C185 and H358, Plaintiff Chavez resides in Texas House District 49 and Congressional District 35.

7. Plaintiff Cynthia Valadez is Latina and a registered voter of Texas. She resides in Austin, Texas. In plans H283, C185 and H358, Plaintiff Valadez resides in Texas House District 51 and Congressional District 35.

8. Plaintiff Emelda Menendez is Latina and a registered voter of Texas. She resides in San Antonio, Texas. In plans H283, C185 and H358, Plaintiff Menendez resides in Texas House District 120 and Congressional District 28.

9. Plaintiff Alejandro Ortiz is Latino and a registered voter of Texas. He resides in San Antonio, Texas. In plans H283, C185 and H358, Plaintiff Ortiz resides in Texas House District 116 and Congressional District 20.

10. Plaintiff Rebecca Ortiz is Latina and a registered voter of Texas. She resides in San Antonio, Texas. In plans H283, C185 and H358, Plaintiff Ortiz resides in Texas House District 116 and Congressional District 20.

11. Plaintiff Armando Cortez is Latino and a registered voter of Texas. He resides in San Antonio, Texas. In plans H283, C185 and H358, Plaintiff Cortez resides in Texas House District 119 and Congressional District 35.

12. Plaintiff Gregorio Benito Palomino is Latino and a registered voter of Texas. He resides in San Antonio, Texas. In plans H283, C185 and H358, Plaintiff Palomino resides in Texas House District 118 and Congressional District 35.

13. Plaintiff Cesar Eduardo Yevenes is Latino and a registered voter of Texas. He resides in Corpus Christi, Texas. In plans H283, C185 and H358, Plaintiff Yevenes resides in Texas House District 32 and Congressional District 27. Plaintiff Yevenes is injured by having the congressional district in which he resides, Congressional District 27, altered so that it is no longer a Latino opportunity district. Plaintiff Yevenes no longer resides in a congressional district in which he has the opportunity to elect his candidate of choice. Plaintiff Yevenes is further injured by having the House District in which he resides reconfigured so that it is no longer a Latino opportunity district. Plaintiff Yevenes resided in Texas House District 33 in the 2010 benchmark House plan. Plaintiff Yevenes no longer resides in a Texas House district in which he has the opportunity to elect his candidate of choice.

14. Plaintiff Jose Olivares is Latino and a registered voter of Texas. He resides in Corpus Christi, Texas. In plans H283, C185 and H358, Plaintiff Olivares resides in Texas House District 34 and Congressional District 27. Plaintiff Olivares is injured by having the congressional district in which he resides, Congressional District 27, altered so that it is no longer a Latino opportunity district. Plaintiff Olivares no longer resides in a

congressional district in which he has the opportunity to elect his candidate of choice.

15. Plaintiff Tomacita Olivares is Latina and a registered voter of Texas. She resides in Corpus Christi, Texas. In plans H283, C185 and H358, Plaintiff Olivares resides in Texas House District 34 and Congressional District 27. Plaintiff Olivares is injured by having the congressional district in which she resides, Congressional District 27, altered so that it is no longer a Latino opportunity district. Plaintiff Olivares no longer resides in a congressional district in which she has the opportunity to elect her candidate of choice.

16. Plaintiff Renato De Los Santos is Latino and a registered voter of Texas. He resides in Dallas, Texas. In plans H283, C185 and H358, Plaintiff De Los Santos resides in Texas House District 111 and Congressional District 6. Plaintiff De Los Santos is injured by the failure to create a Latino-majority congressional district in the Dallas-Fort Worth area that would provide him the opportunity to elect his candidate of choice to Congress. Plaintiff De Los Santos is further injured by race-based redistricting in Plan C185.

17. Plaintiff Alex Jimenez is Latino and a registered voter of Texas. He resides in Fort Worth, Texas. In plans H283, C185 and H358, Plaintiff Jimenez resides in Texas House District 95 and Congressional District 12. Plaintiff Jimenez is injured by the failure to create a Latino-majority congressional district in the Dallas-Fort Worth area that would provide him the opportunity to elect his candidate of choice to

Congress. Plaintiff Jimenez is further injured by race-based redistricting in Plan C185.

18. Plaintiff Gilberto Torres is Latino and a registered voter of Texas. He resides in Uvalde County, Texas. In plans H283, C185 and H358, Plaintiff Torres resides in Texas House District 80 and Congressional District 23 and is injured by having the congressional district in which he resides, Congressional District 23, altered so that it is no longer a Latino opportunity district. Plaintiff Torres no longer resides in a congressional district in which he has the opportunity to elect his candidate of choice. Plaintiff Torres is further injured by race-based redistricting in Plan C185.

19. Plaintiff Socorro Ramos is Latina and a registered voter of Texas. She resides in Socorro, Texas. In plans H283, C185 and H358, Plaintiff Ramos resides in Texas House District 75 and Congressional District 23. Plaintiff Ramos resided in Congressional District 16 in the 2010 benchmark congressional plan. Plaintiff Ramos is injured by having the congressional district in which she resides reconfigured so that she is now located in District 23, which is not a Latino opportunity district. Plaintiff Ramos no longer resides in a congressional district in which she has the opportunity to elect her candidate of choice. Plaintiff Ramos is further injured by race-based redistricting in Plan C185.

20. Plaintiff Sergio Coronado is Latino and a registered voter of Texas. He resides in Canutillo, Texas. In plans H283, C185 and H358, Plaintiff Coronado resides in

Texas House District 78 and Congressional District 16. Plaintiff Coronado is injured by having the House District in which he resides configured so that it does not offer Latino voters the opportunity to elect their candidate of choice. Plaintiff Coronado does not reside in a Texas House district in which he has the opportunity to elect his candidate of choice. Plaintiff Coronado is further injured by race-based redistricting in Plan H283.

21. All plaintiffs are injured by the dilution of Latino voting strength statewide in plans H283, C185 and H358.

22. All plaintiffs are injured by race-based redistricting in plans H283, C185 and H358.

IV.
DEFENDANTS

23. Defendant RICK PERRY is sued in his official capacity as Governor of Texas. Defendant PERRY is the Chief Executive Officer of the State of Texas.

24. Defendant JOHN STEEN is sued in his official capacity as Secretary of State of Texas. Defendant STEEN is the State's election officer and as such is responsible for overseeing the conduct of elections within the State.

V.
FACTS

25. According to the U.S. Census, in 2010 the population of Texas was 25,145,561 with a Latino population of 9,460,921 (38%). The Latino voting age population of

Texas was 34% of the total voting age population. The Latino citizen voting age population of Texas was 25% of the total citizen voting age population. In 2012, the U.S. Census estimated that the population of Texas was 26,059,203 with a total Latino population of 38.2%. Following the 2012 General Election, the Texas Legislative Council reported 13,122,046 registered voters in Texas; 10.3% of the voters are Spanish-surnamed.

26. According to the 2010 Census, approximately 65% of total population growth in Texas between 2000 and 2010 was comprised of Latinos.

27. The redistricting plan in place prior to the 2011 redistricting cycle (the "2010 state house benchmark") for the Texas House of Representatives was ordered into effect on November 28, 2001 by the U.S. District Court for the Eastern District of Texas in *Balderas v. Texas* (No. 6:01CV158).

28. The 2011 redistricting plan for the Texas House of Representatives (Plan H283) was signed into law by Defendant PERRY on June 17, 2011.

29. The 2013 redistricting plan for the Texas House of Representatives (Plan H358) was signed into law by Defendant PERRY on June 26, 2013 and takes effect September 24, 2013.

30. The redistricting plan in place for Texas congressional districts prior to the 2011 redistricting cycle (the "2010 congressional benchmark") was ordered into effect on

August 4, 2006 by the U.S. District Court for the Eastern District of Texas in *LULAC v. Perry* (No. 2:03-00354).

31. The 2011 redistricting plan for Texas congressional districts (Plan C185) was signed into law by Defendant PERRY on July 19, 2011. The 2013 redistricting plan for Texas congressional districts (Plan C235) was signed into law by Defendant Perry on June 26, 2013 and takes effect September 24, 2013.

32. The historical background of Texas House and congressional redistricting includes federal court orders revising Texas's redistricting plans, enacted in 2001 and 2003 respectively, to cure violations of the federal Voting Rights Act.

33. The Legislature's adoption of plans C185 and H283 included departures from the normal procedural sequence and substantive departures from the factors usually considered important by the Legislature in redistricting.

34. During the 82nd Legislature's Regular and Special Sessions, Latino and African American legislators serving on the House and Senate Redistricting Committees were excluded by legislative leadership from the process of drawing and negotiating plans C185 and H283.

35. During the 82nd Legislature's Regular and Special Sessions, Latino and African American residents of Texas were denied the opportunity to analyze and

comment on plans C185 and H283. The House and Senate Redistricting Committees did not hold public hearings following the public release of plans C185 and H283 and prior to voting on plans C185 and H283.

36. Despite the dramatic growth of the Latino population in Texas since 2000, Plan H283 contains one fewer Latino opportunity district when compared to the 2010 benchmark Texas House plan. Under Plan H283, Latinos have lost voting strength in Texas.

37. Plan H283 dilutes Latino voting strength statewide by "packing" Latino voters in El Paso, Cameron, Hidalgo and Nueces counties. Plan H283 fails to create at least three additional Latino-majority House districts that afford Latinos the opportunity to elect their preferred candidate. Plan C185 also uses race as a predominant factor to allocate Latino voters into and out of HD 117 and across districts in El Paso County.

38. On February 28, 2012, the U.S. District Court for the Western District of Texas ordered into effect interim redistricting plans H309 and C235 to address challenges to the 2011 enacted plans that presented a "likelihood of success on the merits" of statutory or constitutional claims or presented "not insubstantial" claims under section 5 of the Voting Rights Act, 42 U.S.C. l973c. *See* Dkt. 690 and 691. Interim plans H309 and C235 were used by Texas for the 2012 election cycle. In the 2013 Regular Session, the Texas Legislature adopted redistricting plans H358 and C235. Enacted Plan C235 contained the same boundaries as interim plan C235. In Plan H358, the

Texas Legislature made several changes to interim plan H309 including changes to the boundaries of HD 90.

39. The Legislature's adoption of plan H358 included departures from the normal procedural sequence and substantive departures from the factors usually considered important by the Legislature in redistricting.

40. During the 83rd Legislature's first Special Session, Plan H358 was adopted as an amendment to SB3 on June 20, 2013, on the floor of the Texas House without consideration of the amendment in committee and without the opportunity for public testimony.

41. The configuration of HD 90 in Plan H358 dilutes Latino voting strength and uses race as a predominant factor to allocate Latino voters into and out of HD 90. In H358, the Texas Legislature changed HD 90 to reduce the number of Latino registered voters and the strength of the Latino vote in HD 90. The changes to HD 90 also reduce the African American citizen voting age population of HD90. The changes to HD 90 in H358 reduce the ability of Latino voters to nominate their preferred candidate in subsequent elections.

42. The significant growth of the Latino population in Texas since 2000 allowed Texas to gain some, if not all of its four new congressional districts. Despite the growth of the Latino population, and the critical role it played in securing the four new congressional districts, Plan C185 contains the same number of Latino

opportunity districts when compared to the 2010 benchmark congressional plan. Plan C185 uses race as a predominant factor to allocate Latino voters into and out of CD 23 and across districts in the Dallas-Fort Worth Metroplex. Plan also C185 dilutes Latino voting strength statewide by "packing" and "fracturing" Latino voters in South Texas, Houston and the Dallas-Fort Worth Metroplex.

43. For example, Plan C185 removes Nueces County, and its more than 200,000 voting-age Latinos, from the South Texas configuration of congressional districts and strands them in a district stretching northward in order to prevent Nueces County Latinos from electing their candidate of choice. In addition to stripping Latinos out of the South Texas configuration of congressional districts, Plan C185 altered Congressional District 23 to prevent Latinos from having the opportunity to elect their candidate of choice. Plan C185 fails to create nine Latino-majority congressional districts that afford Latinos the opportunity to elect their preferred candidate.

44. In the 2010 benchmark congressional plan, Latinos had the opportunity to elect their preferred candidate in 22% (7 of 32) of the state's congressional districts. In Plan C185, Latinos have the opportunity to elect their preferred candidate in 19% (7 of 36) of the state's congressional districts. Thus, despite their growth, in Plan C185 Latinos lost voting strength in Texas.

45. On September 25, 1975, section 5 of the Voting Rights Act of 1965 was extended and amended to cover the

State of Texas. State and political subdivisions covered by the Act must comply with certain specific procedures. Among them is the requirement that all qualifications, prerequisites, standards, practices, or procedures with respect to voting different from those in effect on November l, 1972 must be determined, either by the United States District Court for the District of Columbia or the United States Attorney General, not to have the purpose or effect of denying or abridging the right to vote on account of race, color or membership in a language minority group.

46. The State of Texas was a covered jurisdiction subject to the requirements of section 5 of the Voting Rights Act, as amended, 42 U.S.C. § l973c. On July 27, 2006, President George W. Bush signed into law the Voting Rights Act Reauthorization and Amendments Act of 2006, which extended section 5 for 25 years. On June 25 2013, in *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013), the U.S. Supreme Court invalidated the reauthorized section 5 geographic coverage formula, codified at 42 U.S.C. 1973b(b).

47. Section 3 (c) of the Voting Rights Act of 1965, 42 U.S.C. 1973a(c) authorizes a federal court, following a finding "that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision," may order that the jurisdiction preclear its election changes pursuant to section 5. Section 3 (c) is a permanent provision of the federal Voting Rights Act.

48. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, applies nationwide and prohibits voting practices and procedures that result in the denial or abridgement of the right of any citizen to vote on account of race, color or membership in a language minority group. Section 2 is a permanent provision of the federal Voting Rights Act.

The 2010 Benchmark Texas Congressional Redistricting Plan

49. There were 32 districts in the 2010 benchmark congressional redistricting plan for Texas. Seven of the congressional districts in the 2010 congressional benchmark plan are Latino majority and offer Latinos the opportunity to elect their candidate of choice.

50. Following the 2010 Census, Texas was apportioned 36 congressional districts.

The 2011 Congressional Redistricting Plan (C185)

51. Plan C185 contains 36 congressional districts and contains an overall population deviation of one.

52. Plan C185 contains 7 districts in which Latinos have the opportunity to elect their preferred candidate to Congress.

53. Plan C185 does not include a Latino-majority congressional district in the Dallas-Fort Worth area. Plan C185 also uses race as a predominant factor to allocate Latino voters across districts in the Dallas-Fort Worth Metroplex.

54. The Latino population of Dallas and Tarrant counties is sufficiently geographically compact to comprise the majority of the voting age persons in a congressional district. The Latino population of Dallas and Tarrant counties is also sufficiently geographically compact to comprise the majority of the citizen voting age persons in a congressional district.

55. A congressional district can be created in the Dallas-Fort Worth area that will afford Latino voters the opportunity to elect their candidate of choice.

56. Plan C185 includes only six congressional districts located in the southern and western portion of the state that offer Latinos the opportunity to elect their candidate of choice. Plan C185 also uses race as a predominant factor to allocate Latino voters into and out of CD 23.

57. The Latino population of Texas is sufficiently geographically compact to comprise the majority of citizen voting age persons in at least seven congressional districts located in the southern and western portion of the state.

58. Seven congressional districts can be created in the southern and western portion of the state that offer Latino voters the opportunity to elect their candidate of choice.

59. Plan C185 includes one Latino-majority congressional district in Harris County.

60. The Latino population of Harris County is sufficiently geographically compact to comprise the majority of citizen voting age persons in one congressional district and the majority of voting age persons in a second congressional district. The Latino and African American population of Harris County is sufficiently geographically compact to comprise the majority of citizen voting age persons in one additional congressional district when compared to the benchmark congressional redistricting plan.

61. Two congressional districts can be created in Harris County that will afford Latino voters the opportunity to elect their candidate of choice.

62. Latinos in Texas, including the areas in which Latino-majority congressional districts can be created, are politically cohesive.

63. Anglos (White Non-Hispanics) vote sufficiently as a bloc to enable them - in the absence of special circumstances, such as the Latino candidate running unopposed - usually to defeat the Latino voters' preferred candidates in Texas, including the areas in which Latino-majority congressional districts can be created.

64. Plan C185 interacts with social and historical conditions to cause an inequality in the opportunity of Latino voters to elect representatives of their choice as compared to Anglo voters.

The 2011 Texas House of Representatives Plan (H283)

65. Plan H283 contains a total of 150 House districts. In Plan H283, 34 House districts contain a majority Latino voting age population and 30 House districts contain a majority Latino citizen voting age population.

66. Plan H283 contains fewer districts in which Latinos have the opportunity to elect their candidate of choice when compared to the 2010 benchmark Texas House redistricting plan. Plan H283 offers less opportunity for Latinos to elect their preferred candidates to the Texas House of Representatives when compared to the 2010 benchmark plan.

67. Plan C185 also uses race as a predominant factor to allocate Latino voters into and out of HD 117 and across districts in El Paso County.

68. The Latino population of Texas is sufficiently geographically compact to comprise the majority of citizen voting age persons in at least 33 Texas House districts.

69. At least 33 Texas House districts can be created in the state that offer Latino voters the opportunity to elect their candidate of choice.

70. Latinos in Texas, including the areas in which Latino-majority Texas House districts can be created, are politically cohesive.

71. Anglos vote sufficiently as a bloc to enable them - in the absence of special circumstances, such as the Latino candidate running unopposed - usually to defeat the Latino voters' preferred candidates in Texas, including the areas in which Latino majority Texas House districts can be created.

72. Plan H283 interacts with social and historical conditions to cause an inequality in the opportunity of Latino voters to elect representatives of their choice as compared to Anglo voters.

The 2013 Texas House of Representatives Plan (H358)

73. HD 90 is the only Latino opportunity House district in Tarrant County. In 2011, the Texas Legislature made changes to HD 90, at the urging of the Texas Latino Redistricting Task Force, to raise the Latino voting strength of HD 90. The Legislature's decision to increase the Latino voting strength of HD 90 was maintained by this Court in its interim redistricting plan for the 2012 elections.

74. In the 2012 Democratic Primary election, the Anglo incumbent of HD 90 was challenged by a Latino candidate. The Anglo incumbent prevailed in the Democratic Primary election by 159 votes and went on to win the General Election in November 2012.

75. Plan H358 changes the court-drawn interim plan by swapping precincts between HD 90 and HD 99.

76. Plan H358 moves 4,397 individuals out of interim HD 90 and places them into HD 99. The population

removed from HD 90 is 44% Latino with a Spanish Surnamed Voter Registration (SSVR) of 20.6%.

77. Plan H358 then moves 4,621 individuals into HD 90 from HD 99. The population added to HD 90 is 33.8% Latino with an SSVR of only 8.5%.

78. The changes to HD 90 result in a decrease in the SSVR of HD 90 from 51.1% to 50.1 %. The changes also reduce the African American citizen voting age percentage of HD 90 from 18% to 16%. Plan H358 also uses race as a predominant factor to allocate Latino voters into and out of HD 90.

79. Plans C185 and H283 and the alterations made to HD 90 in H358 operate to dilute the voting strength of Latinos in the State of Texas.

80. At all times relevant herein, Defendants have acted under color of State law.

VI.
CAUSES OF ACTION
COUNT 1
Equal Protection Clause of the 14th Amendment to the U.S. Constitution

81. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

82. Plans C185, H283, and the alterations made to HD 90 in Plan H358 discriminate against Plaintiffs on the basis of race and national origin in violation of the 14th Amendment to the U.S. Constitution.

COUNT 2

15th Amendment to the U.S. Constitution

83. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

84. Plans C185, H283, and the alterations made to HD 90 in Plan H358 discriminate against Plaintiffs on the basis of race and national origin in violation of the 15th Amendment to the U.S. Constitution.

COUNT 3

Section 2 of the Voting Rights Act

85. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

86. Plans C185, H283, and the alterations made to HD 90 in Plan H358 result in a denial or abridgement of the right to vote of individual plaintiffs and organizational plaintiff's members on account of their race, color, or ethnicity, by having the effect of canceling out or minimizing their individual voting strength as minorities in Texas. Plans C185, H283, and the alterations made to HD 90 in Plan H358 do not afford individual plaintiffs and organizational plaintiffs' members an equal opportunity to participate in the political process and to elect representatives of their choice, and denies individual plaintiffs and organizational plaintiff's members the right to vote in elections without distinction of race, color or previous condition of servitude in violation of 42 U.S.C. Section 1973.

VII.
REQUEST FOR THREE JUDGE COURT

87. Plaintiffs request a three-judge trial court pursuant to 28 U.S.C. Section 2284.

VIII.
ATTORNEYS' FEES

88. In accordance with 42 U.S.C. Sections 1973-1(e) and 1988, Plaintiffs are entitled to recover reasonable attorney's fees, expenses and costs.

IX.
PRAYER

89. WHEREFORE, PREMISES CONSIDERED,

Plaintiffs pray that this Court:

(a) assume jurisdiction of this action and request a three-judge panel pursuant to 28 U.S.C. Section 2284;

(b) issue a declaratory judgment finding that Plans C185, H283, and the alterations made to HD 90 in Plan H358 illegally and unconstitutionally dilute the voting strength of Latino voters in Texas, violate section 2 of the Voting Rights Act and the 14th and 15th Amendments to the U.S. Constitution, and are unlawful, null and void;

(c) permanently enjoin Defendants from calling, holding, supervising or certifying any elections under Plans C185, H283, and H358. Plaintiffs have no adequate remedy at law other than the judicial

relief sought herein, and unless the Defendants are enjoined from using Plans C185, H283 and H358, individual plaintiffs and organizational plaintiff's members will be irreparably harmed by the continued violation of their statutory and constitutional rights;

(d) pursuant to 42 U.S.C. 1973a(c), issue an order requiring Texas to preclear its election changes during the ten-year period following the issuance of such order;

(e) set a reasonable deadline for state authorities to enact or adopt redistricting plans for congressional and Texas House districts that do not dilute, cancel out or minimize the voting strength of Latino voters;

(f) if state authorities fail to enact or adopt valid redistricting plans by the Court's deadline, order new redistricting plans for congressional and Texas House districts that do not dilute, cancel out or minimize the voting strength of Latino voters;

(g) adjudge all costs against Defendants, including reasonable attorneys fees and costs;

(h) retain jurisdiction to render any and all further orders that this Court may;

(i) grant any and all further relief to which Plaintiffs may show themselves to be entitled.

DATED: September 9, 2013

Respectfully submitted,

MEXICAN AMERICAN
LEGAL DEFENSE
AND EDUCATIONAL
FUND

/s/ Nina Perales
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ HAROLD, et al.	)	
Plaintiffs	)	CIVIL
-and-	)	ACTION NO:
	)	SA-11-CA-360-
	)	OLG-JES-XR
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC)	)	
Plaintiffs	)	
-and-	)	
THE HONORABLE HENRY CUELLAR Member of Congress, CD 28	)	
Plaintiff-Intervenor	)	
v.	)	
STATE OF TEXAS; RICK PERRY, In his official capacity as Governor of the State of Texas and JOHN STEEN, Secretary of State of the State of Texas,	)	
Defendants	)	

Plaintiff-Intervenor Congressman Cuellar's Second Amended Complaint in Intervention

1. This Court granted Congressman Cuellar's Motion to Intervene (Dkt. #42) and on September 6, 2013 (Dkt. #886) granted our motion to amend our pleadings. Movant now files the Second Amended Complaint in Intervention.

2. This is a redistricting lawsuit. This action is brought pursuant to § 2 of the Voting Rights Act, 42 U.S.C. § 1973 et seq., and the Fourteenth and Fifteenth Amendments to the United States Constitution, 42 U.S.C. § 1983. Plaintiff seeks declaratory and injunctive relief against continued use of any congressional redistricting plan that dilutes the voting strength of Latinos and African Americans.

3. Plaintiff also seek relief under Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c).

4. Plaintiff-Intervenor brings this action requesting declaratory and injunctive relief against the State of Texas.

I. JURISDICTION

5. Plaintiff-Intervenor's complaint arises under the Unites States Constitution and federal statutes. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 1988.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

7. Plaintiff-Intervenor seeks declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

8. Plaintiff-Intervenor requests the convening of a three-judge court pursuant to 28 U.S.C. § 2284.

II. PARTIES

9. Plaintiff Congressman Cuellar is a Latino voter from Webb County. He is a United States Congressman and is a member of the Congressional Caucus. Congressman Cuellar has been a strong advocate for the Latino Community and a leader on issues of importance to the South Texas Community.

10. Defendant is the State of Texas. The State of Texas is a political subdivision covered under the provisions of the Voting Rights Act and responsible for the actions of its officials with regard to state-wide redistricting.

11. Defendant Rick Perry is the duly elected and acting Governor of the State of Texas. Under Article IV, Section 1, of the Texas Constitution, he is the chief executive officer of the Defendant State of Texas. He is sued in his official capacity.

12. Defendant John Steen is sued in his official capacity as Secretary of State of the State of Texas. Defendant Steen is the State's chief election officer and as such is responsible for overseeing the conduct of elections within the State.

FACTS

13. During the 2011 redistricting cycle, the State of Texas adopted congressional plan C 185 as the Congressional Plan for future congressional elections;

14. According to the United States Supreme Court, court ordered redistricting plans should be drawn using the state adopted plan (C185) as the starting point and then modified in those areas in which minority rights were being violated, *Perry v. Perez*, 132 S. Ct. 934 at 941 (Jan. 20, 2012);

15. On March 19, 2012 this Court enjoined the State of Texas from using Plan C185 which was adopted by the Defendants during the 2011 Redistricting Process. The injunction ordered the use of Plan C235 for the 2012 elections as an Interim Court Ordered plan (Dkt#691). The injunction was based on this Court's finding that the voting rights claims asserted against C185 under Section 5 of the Federal Voting Rights Act (VRA), 42 USC 1973c, were "not insubstantial" and that C235 addressed some of the concerns (Dkt# 691, p1);

16. Plan C235 was patterned after C216 which was the bi-partisan plan submitted by intervenors Congressmen Cuellar and Conseco; it was the only plan submitted that used Plan C185 as the starting point as required by *Perry, Id*, and then modified to address the voting rights concerns;

17. This Court's injunction allowed the use of C235 as the interim plan; the Court stated that while C235

addressed most of the voting rights concerns, there were remaining issues under Section 2 of the Voting Rights Act that would be addressed later in so far as the continued use of C235, (Dkt#691 at p.55);

18. After the 2012 elections, on August 28, 2012, the three judge court in the District of Columbia issued a comprehensive decision pursuant to Section 5 of the VRA finding that the State of Texas "intentionally discriminated" against minorities in the 2011 redistricting process, *Texas v. United States*, 887 F. Supp. 2d 133, 160-61 (D.D.C. 2012) (hereinafter referred to as the DDC opinion);[1]

19. After the DDC opinion the Governor of Texas called the first 2013 Special Session during which the legislature was to consider adopting a final redistricting plan for future congressional elections;

20. During the public hearings of the special called session the State of Texas was urged by various parties to consider the DDC opinion as it considered adopting C235

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[1] This decision was later vacated in *Shelby County, Alabama v. Holder, No. 12-96* (June 25, 2013) on unrelated grounds – the coverage formula used in the Voting Rights Act was found to be unconstitutional; however, the Supreme Court made it clear that "We issue no holding on § 5 itself, only on the coverage formula." *Id* p. 24 slip opinion. The findings of fact and conclusions of law made by the three judge court in *Texas* were left undisturbed. This court can give those findings the appropriate consideration and we request that judicial notice of these findings be taken into consideration in this case.

as a permanent remedy plan in the context of this § 2 lawsuit;

21. On June 26, 2013, the Defendants ignored the DDC opinion, it's finding of facts and conclusions of law, and adopted C235 (Dkt#768) as the permanent plan for future congressional elections;

22. The findings of the DDC opinion could have been addressed by the Texas Legislature in so far as the decisions impact on the continued use of C235; the State of Texas chose to ignore the opinion;

23. The specific DDC findings in *Texas v. United States*, 887 F. Supp. 2d 133 that should have been addressed and are incorporated herein as if fully stated include the following:

a. 308 specific Findings of Fact and Law, *Id* at 197 through 247; these findings are incorporated herein so far as they related to the congressional districts;

b. The finding of "intentional discrimination" against minorities' by the State of Texas in the drawing of congressional districts, *Id* it 151 & 159;

c. The 30 specific adverse findings concerning Texas' drawing of CD 23, a Latino District, as intentionally drawn to "reduce the effectiveness of the Latino vote", *Id* at 156 and 205 – facts and law #31 through #60 ;

d. The findings concerning CD 20, another Latino District, in which the State of Texas intentional deletion of "economic engines" from the downtown area of the district, *Id* at 160;

e. The legal protections concerning coalition and cross over minority districts, *Id* at 147;

24. These amended pleadings are directed at challenging the use of C235 on the same grounds as the original pleadings - Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 et seq., and the Fourteenth and Fifteenth Amendments to the United States Constitution, 42 U.S.C. § 1983;

25. While this case was proceeding, the United States Supreme Court invalidated Section 5 of the Voting Rights Act, *Shelby County Alabama v. Holder*, 133 S. ct. 2612 (2013); therefore, these amended pleading also seek relief under Sec 3 (c) as a legal alternative to Section 5;

26. Section 3 (c) of the Voting Rights Act of 1965, 42 U.S.C. 1973a(c) authorizes a federal court, following a finding "that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision," may order that the jurisdiction preclear its election changes pursuant to Section 5. Section 3 (c) is a permanent provision of the federal Voting Rights Act.

27. These amended pleading amend the original pleading to include the process used in the adoption of C185 and the adoption of C235;

28. Upon information and belief, C235 contains the following minority districts:

a. Six (6) districts in which the Latino community will always elect the candidate of their choice – CD 15, 16, 20, 28, 29, and 34;

b. One (1) marginal district in which the Latino community will elect a candidate of their choice 3 out of 10 times – CD 23;

c. Three (3) districts in which the African American community will always elect a candidate of their choice – CD 30, 18 and 9;

d. One (1) combined minority district in which either the African American or Latino Community will elect a candidate of their choice – CD 33.

e. One (1) crossover district in which Latinos will influence the outcome of the general election – CD 35;

29. The redistricting plan in place for Texas congressional districts prior to the 2011 redistricting cycle (the "2010 congressional benchmark") was ordered into effect on August 4, 2006 by the U.S. District Court for the Eastern District of Texas in *LULAC v. Perry* (No. 2:03-00354);

30. The historical background of Texas Congressional redistricting includes federal court orders revising

Texas's redistricting plans, enacted in 2001 and 2003 respectively, to cure violations of the Federal Voting Rights Act;

31. According to the 2010 Census, the Latino population of Texas grew to 9,460,921 from 6,669,666 in the 2000 census. This was an increase of about 42%. According to the 2010 Census, the minority population of Texas comprised almost ninety percent (90%) of the growth. The Latino population accounted for the lion's share of the growth of the Texas Minority population;

32. In 2012, the US Census estimated that the population of Texas was 26,059,203 with a total Latino population of 38.2%; following the 2012 General Election, the Texas Legislative Council reported 13,122,046 registered voters in Texas; 10.3% of the voters are Spanish-surnamed;

33. Elections in Texas continue to be racially polarized;

34. Latinos generally vote as a group and are politically cohesive;

35. African Americans in Texas generally vote as a group and are politically cohesive.

36. Latinos and African Americans in Texas vote as a coalition and are politically cohesive.

37. Anglos in Texas generally vote as group, are politically cohesive and vote sufficiently as a block to defeat the preferred candidate of Latino and African

American voters absent fair and equitable majority-minority single member districts. This has been documented hundreds of times by federal and state courts, the US Commission on Civil Rights and by the US Congress.

CLAIM FOR RELIEF – DISCRIMINATORY RESULT

38. The allegations contained hereinabove are re-alleged re-averred as if fully set forth herein.

39. The election practices and procedure used to apportion the United States Congressional Districts, violates the rights of Latino voters in violation of Section 2 of the Voting Rights Act as well as the 14th and 15th Amendments of the United States Constitution and 42 U.S.C. § 1983.

BASIS FOR EQUITABLE RELIEF

40. Currently Plaintiff-Intervenor has no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for declaratory judgment and injunctive relief is their only means of securing adequate redress from all of the Defendants' unlawful practices.

41. Plaintiff-Intervenor will continue to suffer irreparable injury from all of the Defendants' intentional acts, policies, and practices set forth herein unless enjoined by this Court.

ATTORNEYS FEES COSTS AND EXPENSES

42. This is an appropriate case for the assessment of attorney fees, costs and expenses.

PRAYER

Plaintiff Intervenor respectfully prays that this Court enter Judgment granting:

A. A declaratory judgment that State Defendants' actions violate the rights of Plaintiff as protected by Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 et seq. and that Defendants Perry violated the rights of Plaintiff as protected by the 14th and 15th Amendments to the United States Constitution and 42 U.S.C. § 1983;

B. Preliminary and permanent injunctive relief requiring State Defendants, their successors in office, agents, employees, attorneys and those persons acting in concert with them and/or at their discretion - to develop redistricting plans that do not dilute Latino and minority voting strength for the United States House of Representatives, and to implement a districting plan and also enjoining and forbidding the use of a redistricting plan that dilutes the voting strength of minoirites;

C. An order requiring all Defendants to comply with Sections 2 and Section 3 (c) requirements of the Voting Rights Act;

E. The costs of this suit and reasonable attorneys fees and litigation expenses, including expert witness fees and expenses, pursuant to 42 U.S.C. §§ 1973l(e) and 1988.

F. An order of this Court retaining jurisdiction over this matter until all Defendants have complied with all orders and mandates of this Court; and

G. Such other and further relief as the Court may deem just and proper.

DATED: September 12, 2013

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, et al., Plaintiffs, v. STATE OF TEXAS, et al., Defendants.	§ § § § § § §	CIVIL ACTION NO. 11-CA-360- OLG-JES-XR [Lead case]

MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES, Plaintiffs, v. STATE OF TEXAS, et al., Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. SA-11-CA- 361-OLG-JES- XR [Consolidated case]

TEXAS LATINO REDISTRICTING TASK FORCE, et al., Plaintiffs,	§ § § § §	CIVIL ACTION NO.

v.	§	SA-11-CA
	§	490-OLG-JES-
RICK PERRY,	§	XR
Defendants.	§	(Consolidated
	§	case]

MARGARITA V. QUESADA, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL
	§	ACTION NO.
RICK PERRY, et al.,	§	SA-11-CA-592-
Defendants.	§	OLG-JES-XR
	§	[Consolidated
	§	Case]

EDDIE RODRIGUEZ, et al.,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL
	§	ACTION NO.
RICK PERRY, et al.,	§	SA-11-CA-635-
Defendants.	§	OLG-JES-XR
	§	[Consolidated
	§	Case]
	§	

LULAC INTERVENORS THIRD AMENDED COMPLAINT

appropriate, other electoral standards and practices from those in force or effect in 2011 when this case commenced may be enforced unless and until this Court or the United States Attorney General determines that such change has neither the purpose nor the effect of denying or abridging the voting rights of minority voters.

Parties

2. The following plaintiffs bring this suit:

a. The League of United Latin American Citizens ("LULAC"), founded in 1929, is the oldest and largest Latino civil rights organization in the United States. LULAC is a non-profit organization with presence in most of the fifty states and Puerto Rico. LULAC has chapters in almost all counties in Texas and individual members in almost all of the counties. LULAC has long been active in representing Latinos and other minority interests in all regions of the state through advocacy and litigation.

b. Plaintiff, Gabriel Y. Rosales, is a member of LULAC Council 4819 and a registered voter, with his address at 231 One Oak, San Antonio, TX 78228.

c. Plaintiff, Belen Robles, is a member of LULAC Council 9 and a registered voter, with her address at 3336 Fillmore, El Paso, TX 79930.

d. Plaintiff, Ray Velarde, is a member of LULAC Council 20 and a registered voter, with his address at 1216 Montana Ave., El Paso, TX 78202.

e. Plaintiff, Johnny Villastrigo, is a member of LULAC Council 4604 and registered voter, with his address at 608 Van Buren, Wichita Falls, TX 76301.

f. Plaintiff, Bertha Urteaga, is a member of LULAC Council 4967 and a registered voter, with her address at 514 That Way St., # 1913, Lake Jackson, TX 77566.

g. Plaintiff, Baldomero Garza, is a member of LULAC Council 4967 and a registered voter, with his address at 6502 Sterling Canyon Drive, Katy, TX 77450.

h. Plaintiff, Marcelo H. Tafoya, is a member of LULAC Council 4858 and a registered voter, with his address at 2908 Overdale Road, Austin, TX 78723.

i. Plaintiff, Raul Villaronga, is a member of LULAC Council 4535 and a registered voter, with his address at 602 Trout Cove, Killeen, TX 76542.

j. Plaintiff, Asenet T. Armadillo, is a member of LULAC Council 1 and a registered voter, with her address at 2838 Coleman, Corpus Christi, TX 78405.

k. Plaintiff, Elvira Rios, is a member of LULAC District 13 and a registered voter, with her residence pn Hidalgo County.

l. Plaintiff, Patricia Mancha, is a member of LULAC Council 4871 and a registered voter, with her address at 3827 Stockton Lane, Dallas, TX 75287.

3. Defendants are the Governor of Texas, the Lieutenant Governor of Texas, the Speaker of the Texas House of Representatives, the Secretary of State of Texas, the State of Texas itself, the Chair of the Texas Democratic Party, and the Chair of the Republican Party of Texas. All of the defendant officials are sued in their official capacity only. The Chairs of the two political parties are made defendants only for purposes of remedy, and no recovery of attorney fees is sought as to them. The residences of the state officials, in their official capacity, are all in Travis County, as the seat of government of the State of Texas is in the City of Austin. *See* Tex. Const. art. III, § 58. All the defendants, through their counsel, have entered appearances in this case.

Jurisdiction and venue

4. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 1343(a)(4), 1357, 2201, 2202, and 2284. Venue is proper in this district under 28 U.S.C. § 1391(b) and in this division under 28 U.S.C. § 124(d)(4).

Factual background

5. Until this Court's adoption of an interim congressional plan for purposes of the 2012 elections, the last legally operative congressional districting plan for Texas, containing thirty-two districts, was known as Plan C100. It had been in effect since an order issued on August 4, 2006, by the United States District Court for the Eastern District of Texas in *LULAC v. Perry*, No. 2:03CV158. It had three Districts—CDs 9, 18, and 30—that the state has classified as African-American opportunity districts within the meaning of Section 2 of

the Voting Rights Act of 1965, as amended ("VRA"), 42 U.S.C. § 1973 (generally referred to as "Section 2"). It also had seven districts— CDs 15, 16, 20, 23, 27, 28, and 29— that the state classified as Latino opportunity districts under Section 2 of the VRA. One of these Districts was in Harris County. The other six were in an arc generally running from El Paso, along the Rio Grande River to Brownsville, up to Corpus Christi, and over to San Antonio (termed elsewhere in this pleading the "South Texas Region").

6. The official results of the 2010 census were released on December 21, 2010. On January 5, 2011, the President of the United States, pursuant to 2 U.S.C. § 2a(a), transmitted to Congress a statement showing the population of each of the fifty states, including the defendant State of Texas, as reported in the 2010 census. These population figures show that the State of Texas contains 25,145,561 persons and was entitled to 36 congressional representatives, an increase of four since the reapportionment after the 2000 census.

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account for approximately 24.7 % of the citizen voting age population of the state. Had the overall Texas population grown at the same rate as its Anglo population, the state would not have gained any additional congressional seats and likely would have actually lost a congressional district.

8. As required by the Texas Constitution, the 82nd Texas Legislature convened in regular session on January 11, 2011. On or about February 17, 2011, the Governor and the Texas Legislature received the official 2010 census population numbers for the State of Texas, sufficient to perform the task of congressional redisricting during the now-concluded regular legislative session. The legislature adjourned its regular session *sine die* on May 30, 2011, without enacting a new congressional redistricting plan.

9. The Governor called a special session of the 82nd Texas Legislature and included congressional redistricting as an item in the special session call. The special session convened on May 31, 2011, and adjourned *sine die* on June 29, 2011.

10. Legislation establishing new congressional District lines was passed during the first called special session of the 82nd Texas Legislature. Article II of the new legislation established a redistricting plan—designated Plan C185—for Texas congressional seats. This redistricting plan was designed to cover primary and general elections to federal congressional seats beginning with the 113th United States Congress, which convened in

January 2013. The Governor signed the bill into law in July 2011.

11. At the time, the State of Texas by virtue of the coverage formula in Section 4 of the VRA, was a covered jurisdiction under Section 5 of the VRA, 42 U.S.C. § 1973c (generally referred to as "Section 5"). The Supreme Court subsequently declared Section 4 unconstitutional on June 25, 2013, in *Shelby County v. Holder*, No. 12-96, saying it can no longer be used as the trigger mechanism for Section 5.

12. Plan C185 never became operative as a matter of federal law. A three-judge federal district court in the District of Columbia—in the case of *Texas v. United States*, Civ. Action No. 1:11cv1303—issued an opinion and judgment on August 28, 2012 (with errata corrections on August 30, 2012) denying Section 5 preclearance to Plan C185 on grounds of intentional racial discrimination and retrogression.

13. The state appealed the District of Columbia judgment and preclearance denial to the Supreme Court of the United States, but neither sought nor obtained a stay of the judgment. Before June 27, 2013, when the Supreme Court acted on the state's appeal, the 83rd Texas Legislature enacted, and the Governor signed into law on June 26, 2013, a new redistricting plan for Texas congressional districts denominated Plan C235. This legislation, enacted during the first called session after the 2013 regular session, also repealed the statute enacting Plan C185.

14. Due to Plan C185 not being operative as law, this Court had to fill the legal vacuum by adopting an interim redistricting plan. This court-ordered interim plan—Plan C235—was for use only in the 2012 election cycle.

15. In calling the first special session of the 83rd Texas legislature, the Governor expressly confined the legislature to considering enactment of only one plan concerning Congressional districts: interim Plan C235. The legislature acceded to the Governor's limited call by enacting Plan C235 without any changes whatever. Because it did not receive two-thirds favorable vote in the legislature, the enacted congressional plan will not be effective as state law until late September 2013.

16. Plan C235 fails to satisfy the requirements of the equal protection component of Section 1 of the Fourteenth Amendment to the United States Constitution and Section 1 of the Fifteenth Amendment to the United States Constitution in at least the following particulars:

a. Plan C235 purposefully fragments Latinos in all regions of the state, dispersing them among numerous districts without regard to traditional and neutral redistricting principles, to reduce and lessen their electoral opportunities in congressional election significantly below the level of opportunities that would be available to Latinos were traditional and neutral redistricting principles followed. This fragmentation is done for the purpose of providing undue voting advantages and weight to Anglo voters across the state. In contrast, Plan C235 is intentionally crafted to allow Anglo voters to

dominate districts beyond what their voting power and geographic distribution would otherwise suggest using traditional and neutral redistricting principles even as the legislature actively worked to disregard traditional and neutral redistricting principles to ensure that minority voters could not dominate or even be meaningful voting participants in any district not otherwise formally recognized as a minority opportunity district.

b. Plan C235 purposefully fragments a politically cohesive coalition of African-American and Latino voters in the Dallas-Fort Worth Metroplex, and in the Harris County area in disregard of traditional and neutral redistricting principles, to reduce and lessen the electoral opportunities of minority voters in the area in congressional election and to give undue advantage to Anglo voters.

c. Plan C235 isolates the Latino voting community in Nueces County, which is 60.6 Latino, in an overwhelmingly Anglo District stretching to the outskirts of Travis County. This action was intended to sever the large Latino voting community of Nueces County from other significant groups of Latino voters in the South Texas Region to keep from forming an additional Latino opportunity district and to provide undue advantages and weight to Anglo voters in Nueces County and other parts of CD 27 and to maintain the Anglo incumbent, who was not elected as the candidate of choice of Latino voters, in office.

d. Plan C235, for no compelling reason, uses race as a tool to purposely dismantle and destroy an existing crossover district—former CD 25—anchored in Travis County and the City of Austin and the tri-ethnic voting coalition there. The overriding purpose of this racially-based dismantlement was to fragment the existing and operative tri-ethnic coalition so that a cohesive minority voting community of African-Americans and Latinos could not vote together with a community of Anglos crossing over to vote for the candidate of choice of the African-American and Latino voting coalition in order to continue electing their candidate of choice in congressional elections. In so carving up the residents of Travis County and Austin, the legislature disregarded traditional and neutral redistricting principles, which, if followed, would have included at least one, and possibly more, districts firmly anchored in the city and county as well as eliminating the possibility that as many as two additional districts that would be in excess of 50% Hispanic citizen majority .

e. Plan C235 purposely continues in place a race-based redrawing of the historic CD 20, along held by Latino incumbents elected as the candidate of choice of Latino voters, so that iconic elements of the district, such as the Alamo, and significant economic institutions are removed from the district in disregard of traditional and neutral redistricting principles.

17. Plans C185 and C235 fail to satisfy the requirements of the VRA's Section 2 in at least the following particulars:

a. In the South Texas Region, while still honoring the requirements of the Fourteenth and Fifteenth Amendments, at least one, and possibly two, congressional districts could have been formed, and solidly anchored there, that would have contained a reasonably compact population of Latinos who are citizens of voting age who would constitute at least 50% of the citizen voting age population of the district. In this area, the Latino voters are politically cohesive and the majority Anglo voters vote sufficiently as a bloc to enable them, in the absence of special circumstances, usually to defeat the preferred candidate of the Latino voters. These facts coexist with other circumstances in the area—including a history of official discrimination with respect to the opportunity of Latinos to exercise the right to vote, a lack of responsiveness on the part of elected officials to the particularized needs of Latinos, and the tenuous nature of the justification for the congressional district lines drawn in the area—to provide a less than equal opportunity for the Latinos there to participate in the political process and to elect congressional representatives of their choice.

b. Still in the South Texas Region—specifically, the geographic area roughly encompassed by

former CD 23 and Plan C235's CD 23—Plan C235 fails to establish CD 23 as a reasonably performing Latino opportunity district. While honoring the basic geographic contours embraced by current CD 23, and still creating an additional Latino opportunity district as addressed in ¶ 19.a, the legislature had available to it a reasonably compact population of Latinos who are citizens of voting age who would constitute at least 50% of the citizen voting age population of the district. In this area, the Latino voters are politically cohesive and the majority Anglo voters vote sufficiently as a bloc to enable them, in the absence of special circumstances, usually to defeat the preferred candidate of the Latino voters. These facts coexist with other circumstances in the area—including a history of official discrimination with respect to the opportunity of Latinos to exercise the right to vote, a lack of responsiveness on the part of elected officials to the particularized needs of Latinos, and the tenuous nature of the justification for the congressional district lines drawn in the area—to provide a less than equal opportunity for the Latinos there to participate in the political process and to elect congressional representatives of their choice.

c. Plan C235 fails to create in the Dallas Forth Worth Metroplex an additional minority opportunity district, separate and apart from CD33, composed of an operative and cohesive coalition of African-American and Latino voters.

The legislature had available to it a reasonably compact population of African-Americans and Latinos who are citizens of voting age who would constitute at least 50% of the citizen voting age population of the district. In this area, the African-American and Latino voters are politically cohesive and the majority Anglo voters vote sufficiently as a bloc to enable them, in the absence of special circumstances, usually to defeat the preferred candidate of the coalition of African-American and Latino voters. These facts coexist with other circumstances in the area—including a history of official discrimination with respect to the opportunity of African-Americans and Latinos to exercise the right to vote, a lack of responsiveness on the part of elected officials to the particularized needs of African-Americans and Latinos, and the tenuous nature of the justification for the congressional district lines drawn in the area—to provide a less than equal opportunity for the coalition of African-Americans and Latinos there to participate in the political process and to elect congressional representatives of their choice.

d. The 2012 election results showed that, as had been contended by the Quesada plaintiffs from the outset of this case (see Quesada First Amended Complaint (Dkt. #84-1 at ¶s 45, 46 and 56), the African-American population in the Dallas-Fort Worth region was sufficiently large and geographically compact to support the creation of a second African-American ability to

elect district in that area (in addition to the pre-existing District (CD 30) held by Congresswoman Eddie Bernice Johnson). In the 2012 elections, African-American voters in District 33 demonstrated an effective ability to elect their preferred candidate of choice to Congress, African-American Marc Veasey (one of the original plaintiffs in the Quesada v. Perry suit). African-American candidate Veasey was the overwhelming candidate of choice of African-American majority in both the Democratic primary and runoff elections. In both the primary and runoff, African-American voters comprised a majority of the voters in CD 33 who cast ballots (63% in the primary and 53% in the runoff). Veasey prevailed in the general election, with an estimated 99% of the African-American voters casting their ballots for Veasey and an estimated 95% of Hispanics doing so.

68. Although CD 33 performed as an African-American ability to elect district in the 2012 election cycle, the minority population in the DFW region remains fractured, containing large pockets of minority population that are stranded in districts dominated by Anglo bloc voters. So while the interim plan did rearrange the DFW region, the State's intentional fracturing of the minority population was not fully addressed and cured. Indeed, it is possible, as the Quesada plaintiffs (and others) have demonstrated in their alternative plans, to create in the DFW region two African-American ability to elect districts and a third district which would provide Latino

voters with an effective ability to elect their preferred candidate

e.. The court-ordered interim plan, while an improvement over the state's 2011 enacted plan (C185), still contains several features that dilute minority voting strength and are remnants or perpetuate the state's intentional discrimination against minority voters.

18. Plan C235 continues the State of Texas's consistent and repeated practice of engaging in intentional discrimination on the basis of race in its design of electoral districts and other statewide electoral actions. These violations, including one or more of those alleged in paragraph 16, above, reflect intentional racial discrimination and violations of the Fourteenth and Fifteenth Amendments in derogation of the current conditions for minority voters in the state. Therefore, they justify the imposition of equitable relief authorized by the VRA's Section 3(c).

Causes of action

Count 1: VRA Section 2

19. The facts alleged herein constitute a denial or abridgement of the plaintiffs' right to vote for their representative to the United States House of Representatives, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

Count 2: Equal protection

20. The facts alleged herein constitute a denial to the plaintiffs of rights guaranteed by the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

Count 3: Constitutional right to vote

21. The facts alleged herein constitute a deprivation of the plaintiffs' rights under the Fifteenth Amendment to the United States Constitution.

Count 4: Section 3(c) injunction

22. The facts alleged herein establish that the Court should grant equitable relief authorized by the VRA's Section 3(c), 42 U.S.C. § 1973a(c). LULAC incorporates its joint motion and accompanying Memorandum of Law pursuant to sec. 3(c). (Dkt. 884). For brevity LULAC will not repeat herein.

Prayer for relief

23. Based upon the foregoing matters, the plaintiffs pray that this Court:

a. Continue to assume jurisdiction over this action as a three-judge District Court pursuant to 28 U.S.C. § 2284;

b. Enter a declaratory judgment that the Texas congressional Districts in Plans C185 and C235 violate the plaintiffs' rights under the United States Constitution and federal law, as alleged under ¶¶ 19-22, above;

c. Enter an injunction that the State of Texas is required for not less than the next ten years to obtain preclearance, before implementation, from either this Court or the Attorney General of the United States for any state-level redistricting changes, and such other state-level electoral changes as the Court adjudges appropriate, from electoral practices and standards in force or effect as of May 9, 2011;

d. Grant plaintiffs appropriate injunctive relief enjoining the defendants, their officers, agents, employees, attorneys, successors in office, and all persons in active concert or participation with them, from any implementation or use of Plan C235 in primary and general elections until and unless the injunction sought in paragraph 25.c is satisfied and the legal violations found with respect to Plan C235 are remedied by the Texas Legislature by a date certain or by this Court :

e. Grant the plaintiffs their reasonable attorney fees, litigation expenses, and costs in maintaining this action; and

f. Grant the plaintiffs such further relief as may be necessary, appropriate, and equitable.

Respectfully Submitted,

Luis Robeito Vera, Jr.
SBN: 20546740

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Attorneys for the LULAC Plaintiff-Intervenor

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, et al.,	§	
Plaintiffs,	§	CIVIL
	§	ACTION NO.
v.	§	11-CV-360-
	§	OLG-JES-XR
STATE OF TEXAS, et al.,	§	[Lead case]
Defendants.	§	

MEXICAN AMERICAN	§	
LEGISLATIVE CAUCUS,	§	
TEXAS HOUSE OF	§	
REPRESENTATIVES,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL
	§	ACTION NO.
	§	SA-11-CA-
STATE OF TEXAS, et al.,	§	361-OLG-JES-
Defendants.	§	XR
	§	[Consolidated
	§	case]

TEXAS LATINO	§	
REDISTRICTING TASK	§	
FORCE, et al.,	§	
Plaintiffs,	§	CIVIL
	§	ACTION NO.

v.	§	SA-11-CA
	§	490-OLG-JES-
RICK PERRY,	§	XR
Defendants.	§	(Consolidated
	§	case]

MARGARITA V. QUESADA,	§	
et al.,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL
	§	ACTION NO.
RICK PERRY, et al.,	§	SA-11-CA-592-
Defendants.	§	OLG-JES-XR
	§	[Consolidated
	§	Case]

EDDIE RODRIGUEZ, et al.,	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL
	§	ACTION NO.
RICK PERRY, et al.,	§	SA-11-CA-635-
Defendants.	§	OLG-JES-XR
	§	[Consolidated
	§	Case]
	§	

SECOND AMENDED COMPLAINT

The Rodriguez plaintiffs Eddie Rodriguez, Milton Gerard Washington, Bruce Elfant, Balakumar Pandian, Alex Serna, Sandra Serna, Betty F. Lopez, David Gonzalez, Beatrice Saloma, Lionor Sorola-Pohlman, Eliza Alvarado, Juanita Valdez-Cox, Josie Martinez, Nina Jo Baker, Travis County, and the City of Austin supplement and amend their First Amended Complaint and, in doing so, adopt their allegations that the 2011 congressional redistricting was based on intentional race-based actions violating the United States Constitution's Fourteenth and Fifteenth Amendments. Through this amended complaint, the Rodriguez plaintiffs challenge both the legislatively-adopted 2011 Plan C185 and the legislative-adopted Plan C235 and request injunctive relief under Section 3(c) of the Voting Rights Act deriving from each of these sets of challenges.

Introduction

1. In its first called special session, the 83rd Texas Legislature passed Senate Bill 4 ("SB 4"), redistricting Texas congressional districts in a plan denominated Plan C235. SB 4 also repealed the congressional redistricting plan, denominated Plan C185, enacted and signed into law in 2011. The Governor signed SB 4 on June 26, 2013; under the Texas Constitution, it becomes effective as a matter of state law on September 24, 2013.

Plaintiffs allege that Plan C185 Plan C235 violate rights guaranteed by the Fourteenth and Fifteenth Amendments to the United States Constitution and by Section 2 of the federal Voting Rights Act. Accordingly, plaintiffs seek a declaration that the congressional districts inPlan C185 and in Plan C235 are invalid and an injunction prohibiting defendants from calling, holding,

supervising, or taking any action concerning primary or general elections for Texas members of the United States House of Representatives based on Plan C235.

In addition, in order to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments to the United States Constitution, plaintiffs seek equitable relief under Section 3(c) of the Voting Rights Act whereby the Court would retain jurisdiction for an appropriate period during which no state-level change in districting and, as appropriate, other electoral standards and practices from those in force or effect in 2011 when this case commenced may be enforced unless and until this Court or the United States Attorney General determines that such change has neither the purpose nor the effect of denying or abridging the voting rights of minority voters.

Parties

2. The following plaintiffs bring this suit in their personal capacities, as registered voters in the State of Texas:

a. Eddie Rodriguez, who is Hispanic, resides at 1910 Haskell Street, Austin, Texas 78702, in former Congressional District ("CD") 25,* and Plan C185' s CD 35, and Plan C235' s CD 35.

b. Milton Gerard Washington, who is African-American, resides at 11500 Oak Trail, Austin, Texas

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* "Former," when used in connection with a specified congressional district, refers to the congressional districts in effect immediately preceding the 2011 enactment adopting Plan C185. The plan for these fonner districts was denominated Plan C100.

78753, in former CD 10, Plan C185's CD 10, and Plan C235' s CD 10.

c. Bruce Elfant, who is Anglo, resides at 4522 Avenue F, Austin, Texas 78751, in former CD 25, Plan C185's CD 10, and Plan C235' s CD 10.

d. Balakumar Pandian, who is Asian-American, resides at 2001 East 21st Street, Austin, Texas 78722, in former CD 25, Plan C185's CD 25, and Plan C235's CD 25.

e. Alex Serna and Sandra Serna, who are Hispanic, reside at 5448 La Estancia, El Paso, Texas 79932, in former CD 16, Plan C185's CD 16, and Plan C235's CD 16.

f. Betty F. Lopez, who is Hispanic, resides at 305 S. Nueces Street, San Antonio, Texas 78207, in former CD 20, Plan C185's CD 35, and Plan C235's CD 35.

g. David Gonzalez, who is Hispanic, resides at 618 Cobble Drive, San Antonio, Texas 78216, in former CD 21, Plan C185's CD 20, and Plan C235's CD 20.

h. Beatrice Saloma, who is Hispanic, resides at 277 West Wildwood Drive, San Antonio, Texas 78212, in former CD 20, Plan C185's CD 20, and Plan C235's CD 20.

i. Lionor Sorola-Pohlman, who is Hispanic, resides at 2314 Tannehill Drive, Houston, Texas 77008, in

former CD 18, Plan C185's CD 2, and Plan C235's CD 2.

j. Eliza Alvarado, who is Hispanic, resides at 1306 W. Kiwi, #4, Pharr, Texas 78577, in former CD 15, Plan C185's CD 15, and Plan C235's CD 15.

k. Juanita Valdez-Cox, who is Hispanic, resides at 302 N. Valley View, Donna, Texas 78537, in former CD 15, Plan C185's CD 34, and Plan C235's CD 34

l. Josie Martinez, who is Hispanic, resides at 317 East Drew Street, Fort Worth, Texas 76110, in former CD 12, Plan C185's CD 26, and Plan C235's CD 33.

m. Nina Jo Baker, who is African-American, resides at 1002 East 2nd Street, Fort Worth, Texas 76102, in former CD 12, Plan C185's CD 26, and Plan C235's CD 12.

3. Plaintiff Travis County, a political subdivision of the State of Texas under Article I, Section 1, of the Texas Constitution, is charged by the Texas Legislature with principal local responsibility for the conduct of elections, including elections for congressional office. *See, e.g.*, Tex. Elec. Code, ch. 31, subch. B & ch. 32, subch. A. Under Section 42.001(a) of the Election Code, the County's Commissioners Court is responsible for establishing election precincts within its territory and, in redistricting years, is directed in Section 42.032 of the Election Code to complete the process by October 1st. As a geographically compact and contiguous political subdivision with many residents sharing similar concerns, and with a population

of 1,024,266 under the 2010 census, 325,778 people in excess of the ideal population size for a congressional district, Travis County forms a distinct community of interest under traditional districting principles.

4. Plaintiff the City of Austin, a political subdivision of the State of Texas, is a home rule municipality under Article XI, Section 5, of the Texas Constitution, with full power of local self-government under Texas Local Government Code § 51.072(a), and is authorized by Article I, § 3, of its charter to take such actions as its governing body deems necessary to advance the interests of its residents. As a geographically compact and contiguous political subdivision with many residents sharing similar concerns, and with a population of 790,390 under the 2010 census, 91,902 people in excess of the ideal population size for a congressional district, Austin forms a distinct community of interest under traditional districting principles.

5. Defendants are the Governor of Texas, the Lieutenant Governor of Texas, the Speaker of the Texas House of Representatives, the Secretary of State of Texas, the State of Texas itself, the Chair of the Texas Democratic Party, and the Chair of the Republican Party of Texas. All of the defendant officials are sued in their official capacity only. The Chairs of the two political parties are made defendants only for purposes of remedy, and no recovery of attorney fees is sought as to them. The residences of the state officials, in their official capacity, are all in Travis County, as the seat of government of the State of Texas is in the City of Austin. *See* Tex. Const. art.

III, § 58. All the defendants, through their counsel, have entered appearances in this case.

Jurisdiction and venue

6. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 1343(a)(4), 1357, 2201, 2202, and 2284. Venue is proper in this district under 28 U.S.C. § 1391(b) and in this division under 28 U.S.C. § 124(d)(4).

Factual background

7. Until this Court's adoption of an interim congressional plan for purposes of the 2012 elections, the last legally operative congressional districting plan for Texas, containing thirty-two districts, was known as Plan C100. It had been in effect since an order issued on August 4, 2006, by the United States District Court for the Eastern District of Texas in *LULAC v. Perry*, No. 2:03CV158. It had three districts—CDs 9, 18, and 30—that the state has classified as African-American opportunity districts within the meaning of Section 2 of the Voting Rights Act of 1965, as amended ("VRA"), 42 U.S.C. § 1973 (generally referred to as "Section 2"). It also had seven districts—CDs 15, 16, 20, 23, 27, 28, and 29—that the state classified as Hispanic opportunity districts under Section 2 of the VRA. One of these districts was in Harris County. The other six were in an arc generally running from El Paso, along the Rio Grande River to Brownsville, up to Corpus Christi, and over to San Antonio (termed elsewhere in this pleading the "South Texas Region").

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10. As required by the Texas Constitution, the 82nd Texas Legislature convened in regular session on January 11, 2011. On or about February 17, 2011, the Governor and the Texas Legislature received the official 2010 census population numbers for the State of Texas, sufficient to perform the task of congressional

redistricting during the now-concluded regular legislative session. The legislature adjourned its regular session *sine die* on May 30, 2011, without enacting a new congressional redistricting plan.

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States, Civ. Action No. 1:11cv1303—issued an opinion and judgment on August 28, 2012 (with errata corrections on August 30, 2012) denying Section 5 preclearance to Plan C185 on grounds of intentional racial discrimination and retrogression.

15. The state appealed the District of Columbia judgment and preclearance denial to the Supreme Court of the United States, but neither sought nor obtained a stay of the judgment. Before June 27, 2013, when the Supreme Court acted on the state's appeal, the 83rd Texas Legislature enacted, and the Governor signed into law on June 26, 2013, a new redistricting plan for Texas congressional districts denominated Plan C235. This legislation, enacted during the first called session after the 2013 regular session, also repealed the statute enacting Plan C185.

16. Due to Plan C185 not being operative as law, this Court had to fill the legal vacuum by adopting an interim redistricting plan. This court-ordered interim plan—Plan C235—was for use only in the 2012 election cycle.

17. In calling the first special session of the 83rd Texas legislature, the Governor expressly confined the legislature to considering enactment of only one plan concerning Congressional districts: interim Plan C235. The legislature acceded to the Governor's limited call by enacting Plan C235 without any changes whatever. Because it did not receive two-thirds favorable vote in the legislature, the enacted congressional plan will not be effective as state law until September 24, 2013, nor will the repeal of Plan C185 be effective until then

18. Plan C185 fails to satisfy the requirements of the equal protection component of Section 1 of the Fourteenth Amendment to the United States Constitution and Section 1 of the Fifteenth Amendment to the United States Constitution in at least the following particulars:

a. Plan C185 purposefully fragments Hispanic and African-Americans in all regions of the state, dispersing them among numerous districts without regard to traditional and neutral redistricting principles, to reduce and lessen their electoral opportunities in congressional election significantly below the level of opportunities that would be available to Hispanics were traditional and neutral redistricting principles followed. This fragmentation is done for the purpose of providing undue voting advantages and weight to Anglo voters across the state. In contrast, Plan C185 is intentionally crafted to allow Anglo voters to dominate districts beyond what their voting power and geographic distribution would otherwise suggest using traditional and neutral redistricting principles even as the legislature actively worked to disregard traditional and neutral redistricting principles to ensure that minority voters could not dominate or even be meaningful voting participants in any district not otherwise formally recognized as a minority opportunity district.

b. Plan C185 purposefully fragments a politically cohesive coalition of African-American and Hispanic voters in the Dallas-Fort Worth Metroplex, in

disregard of traditional and neutral redistricting principles, to reduce and lessen the electoral opportunities of minority voters in the area in congressional election and to give undue advantage to Anglo voters.

c. Plan C185 isolates the Hispanic voting community in Nueces County, which is 60.6 Hispanic, in an overwhelmingly Anglo district stretching to the outskirts of Travis County and which is characterized by significant levels of racially polarized voting. This action was intended to sever the large Hispanic voting community of Nueces County from other significant groups of Hispanic voters in the South Texas Region to keep from forming an additional Hispanic opportunity district and to provide undue advantages and weight to Anglo voters in Nueces County and other parts of CD 27 and to maintain the Anglo incumbent, who was not elected as the candidate of choice of Hispanic voters, in office.

d. Plan C185, for no compelling reason, uses race as a tool to purposely dismantle and destroy an existing crossover district—former CD 25—anchored in Travis County and the City of Austin and the tri-ethnic voting coalition there. The overriding purpose of this racially-based dismantlement was to fragment the existing and operative tri-ethnic coalition so that a cohesive minority voting community of African-Americans and Hispanics could not vote together with a community of Anglos crossing over to vote for the candidate of choice of

the African-American and Hispanic voting coalition in order to continue electing their candidate of choice in congressional elections. In so carving up the residents of Travis County and Austin, the legislature disregarded traditional and neutral redistricting principles, which, if followed, would have included at least one, and possibly more, districts firmly anchored in the city and county.

e. Plan C185 purposely continues in place a race-based redrawing of the historic CD 20, along held by Hispanic incumbents elected as the candidate of choice of Hispanic voters, so that iconic elements of the district, such as the Alamo, and significant economic institutions are removed from the district in disregard of traditional and neutral redistricting principles.

19. Plan C235 fails to satisfy the requirements of the equal protection component of Section 1 of the Fourteenth Amendment to the United States Constitution and Section 1 of the Fifteenth Amendment to the United States Constitution in at least the following particulars:

a. Plan C235 purposefully fragments Hispanics and African-Americans in all regions of the state, dispersing them among numerous districts without regard to traditional and neutral redistricting principles, to reduce and lessen their electoral opportunities in congressional election significantly below the level of opportunities that would be available to Hispanics were traditional and neutral redistricting principles followed. This fragmentation

is done for the purpose of providing undue voting advantages and weight to Anglo voters across the state. In contrast, Plan C235 is intentionally crafted to allow Anglo voters to dominate districts beyond what their voting power and geographic distribution would otherwise suggest using traditional and neutral redistricting principles even as the legislature actively worked to disregard traditional and neutral redistricting principles to ensure that minority voters could not dominate or even be meaningful voting participants in any district not otherwise formally recognized as a minority opportunity district.

b. Plan C235, even with its inclusion of CD 33, continues to purposefully fragment a politically cohesive coalition of African-American and Hispanic voters in the Dallas-Fort Worth Metroplex, in disregard of traditional and neutral redistricting principles, to reduce and lessen the electoral opportunities of minority voters in the area in congressional election and to give undue advantage to Anglo voters.

c. Plan C235 isolates the Hispanic voting community in Nueces County, which is 60.6 Hispanic, in an overwhelmingly Anglo district stretching to the outskirts of Travis County and which is characterized by significant levels of racially polarized voting. This action was intended to sever the large Hispanic voting community of Nueces County from other significant groups of Hispanic voters in the South Texas Region to keep from forming an additional Hispanic opportunity district

and to provide undue advantages and weight to Anglo voters in Nueces County and other parts of CD 27 and to maintain the Anglo incumbent, who was not elected as the candidate of choice of Hispanic voters, in office.

d. Plan C235, for no compelling reason, uses race as a tool to purposely dismantle and destroy an existing crossover district—former CD 25—anchored in Travis County and the City of Austin and the tri-ethnic voting coalition there. The overriding purpose of this racially-based dismantlement was to fragment the existing and operative tri-ethnic coalition so that a cohesive minority voting community of African-Americans and Hispanics could not vote together with a community of Anglos crossing over to vote for the candidate of choice of the African-American and Hispanic voting coalition in order to continue electing their candidate of choice in congressional elections. In so carving up the residents of Travis County and Austin, the legislature disregarded traditional and neutral redistricting principles, which, if followed, would have included at least one, and possibly more, districts firmly anchored in the city and county.

e. Plan C235 purposely continues in place a race-based redrawing of the historic CD 20, along held by Hispanic incumbents elected as the candidate of choice of Hispanic voters, so that iconic elements of the district, such as the Alamo, and significant economic institutions are removed from the district

in disregard of traditional and neutral redistricting principles.

20. Plan C185 fails to satisfy the requirements of the VRA's Section 2 in its intentional actions as described in ¶ 18, above, and in at least the following additional particulars:

a. In the South Texas Region, while still honoring the requirements of the Fourteenth and Fifteenth Amendments, at least one, and possibly two, congressional districts could have been formed, and solidly anchored there, that would have contained a reasonably compact population of Hispanics who are citizens of voting age who would constitute at least 50% of the citizen voting age population of the district. In this area, the Hispanic voters are politically cohesive and the majority Anglo voters vote sufficiently as a bloc to enable them, in the absence of special circumstances, usually to defeat the preferred candidate of the Hispanic voters. These facts coexist with other circumstances in the area—including a history of official discrimination with respect to the opportunity of Hispanics to exercise the right to vote, a lack of responsiveness on the part of elected officials to the particularized needs of Hispanics, and the tenuous nature of the justification for the congressional district lines drawn in the area—to provide a less than equal opportunity for the Hispanics there to participate in the political process and to elect congressional representatives of their choice.

b. Still in the South Texas Region—specifically, the geographic area roughly encompassed by former CD 23—Plan C1855 fails to establish a reasonably performing Hispanic opportunity district. While creating an additional Hispanic opportunity district as addressed in ¶ 18.d, the legislature had available to it a reasonably compact population of Hispanics who are citizens of voting age who would constitute at least 50% of the citizen voting age population of the district. In this area, the Hispanic voters are politically cohesive and the majority Anglo voters vote sufficiently as a bloc to enable them, in the absence of special circumstances, usually to defeat the preferred candidate of the Hispanic voters. These facts coexist with other circumstances in the area—including a history of official discrimination with respect to the opportunity of Hispanics to exercise the right to vote, a lack of responsiveness on the part of elected officials to the particularized needs of Hispanics, and the tenuous nature of the justification for the congressional district lines drawn in the area—to provide a less than equal opportunity for the Hispanics there to participate in the political process and to elect congressional representatives of their choice.

c. Plan C185 fails to create in the Dallas-Forth Worth Metroplex a minority opportunity district composed of an operative and cohesive coalition of African-American and Hispanic voters. The legislature had available to it a reasonably compact population of African-Americans and Hispanics who are citizens of voting age who would constitute at least 50% of the

citizen voting age population of the district. In this area, the African-American and Hispanic voters are politically cohesive and the majority Anglo voters vote sufficiently as a bloc to enable them, in the absence of special circumstances, usually to defeat the preferred candidate of the coalition of African-American and Hispanic voters. These facts coexist with other circumstances in the area—including a history of official discrimination with respect to the opportunity of African-Americans and Hispanics to exercise the right to vote, a lack of responsiveness on the part of elected officials to the particularized needs of African-Americans and Hispanics, and the tenuous nature of the justification for the congressional district lines drawn in the area—to provide a less than equal opportunity for the coalition of African-Americans and Hispanics there to participate in the political process and to elect congressional representatives of their choice.

21. Plan C235 fails to satisfy the requirements of the VRA's Section 2 in its intentional actions as described in ¶ 19, above,and in at least the following additional particulars:

a. In the South Texas Region, while still honoring the requirements of the Fourteenth and Fifteenth Amendments, at least one, and possibly two, congressional districts could have been formed, and solidly anchored there, that would have contained a reasonably compact population of Hispanics who are citizens of voting age who would constitute at least 50% of the citizen voting age population of the

district. In this area, the Hispanic voters are politically cohesive and the majority Anglo voters vote sufficiently as a bloc to enable them, in the absence of special circumstances, usually to defeat the preferred candidate of the Hispanic voters. These facts coexist with other circumstances in the area—including a history of official discrimination with respect to the opportunity of Hispanics to exercise the right to vote, a lack of responsiveness on the part of elected officials to the particularized needs of Hispanics, and the tenuous nature of the justification for the congressional district lines drawn in the area—to provide a less than equal opportunity for the Hispanics there to participate in the political process and to elect congressional representatives of their choice.

b. Still in the South Texas Region—specifically, the geographic area roughly encompassed by former CD 23 and Plan C235's CD 23—Plan C235 fails to establish CD 23 as a reasonably performing Hispanic opportunity district. While honoring the basic geographic contours embraced by current CD 23, and still creating an additional Hispanic opportunity district as addressed in ¶ 19.d, the legislature had available to it a reasonably compact population of Hispanics who are citizens of voting age who would constitute at least 50% of the citizen voting age population of the district. In this area, the Hispanic voters are politically cohesive and the majority Anglo voters vote sufficiently as a bloc to enable them, in the absence of special circumstances, usually to def eat the preferred candidate of the

Hispanic voters. These facts coexist with other circumstances in the area—including a history of official discrimination with respect to the opportunity of Hispanics to exercise the right to vote, a lack of responsiveness on the part of elected officials to the particularized needs of Hispanics, and the tenuous nature of the justification for the congressional district lines drawn in the area—to provide a less than equal opportunity for the Hispanics there to participate in the political process and to elect congressional representatives of their choice.

c. Plan C235 fails to create in the Dallas-Forth Worth Metroplex an additional minority opportunity district composed of an operative and cohesive coalition of African-American and Hispanic voters. The legislature had available to it a reasonably compact population of African-Americans and Hispanics who are citizens of voting age who would constitute at least 50% of the citizen voting age population of the district. In this area, the African-American and Hispanic voters are politically cohesive and the majority Anglo voters vote sufficiently as a bloc to enable them, in the absence of special circumstances, usually to defeat the preferred candidate of the coalition of African-American and Hispanic voters. These facts coexist with other circumstances in the area—including a history of official discrimination with respect to the opportunity of African-Americans and Hispanics to exercise the right to vote, a lack of responsiveness on the part of elected officials to the particularized

needs of African-Americans and Hispanics, and the tenuous nature of the justification for the congressional district lines drawn in the area—to provide a less than equal opportunity for the coalition of African-Americans and Hispanics there to participate in the political process and to elect congressional representatives of their choice.

22. Plan C235, as does Plan C185, continues the State of Texas's consistent and repeated practice of engaging in intentional discrimination on the basis of race in its design of electoral districts and other statewide electoral actions. These violations, including one or more of those alleged in paragraphs 18 and 19, above, reflect intentional racial discrimination and violations of the Fourteenth and Fifteenth Amendments in derogation of the current conditions for minority voters in the state. Therefore, they justify the imposition of equitable relief authorized by the VRA's Section 3(c), with regard to the violations in both Plan C185 and Plan C235.

Causes of action

Count 1: VRA Section 2

23. The facts alleged herein constitute a denial or abridgement of the plaintiffs' right to vote for their representative to the United States House of Representatives, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

Count 2: Equal protection

24. The facts alleged herein constitute a denial to the plaintiffs of rights guaranteed by the Equal Protection

Clause of Section 1 of the Fourteenth Amendment to the United States Constitution.

Count 3: Constitutional right to vote

25. The facts alleged herein constitute a deprivation of the plaintiffs' rights under the Fifteenth Amendment to the United States Constitution.

Count 4: Section 3(c) injunction

26. The facts alleged herein establish that the Court should grant equitable relief authorized by the VRA's Section 3(c), 42 U.S.C. § 1973a(c).

Prayer for relief

27. Based upon the foregoing matters, the plaintiffs pray that this Court:

a. Continue to assume jurisdiction over this action as a three-judge District Court pursuant to 28 U.S.C. § 2284;

b. Enter a declaratory judgment that the Texas congressional districts in Plan C185 and in Plan C235 violate the plaintiffs' rights under the United States Constitution and federal law, as alleged under ¶¶ 18-19 and 24-25, above;

c. Enter an injunction that the State of Texas is required for not less than the next ten years to obtain preclearance, before implementation, from either this Court or the Attorney General of the United States for any state-level redistricting changes, and such other state-level electoral

changes as the Court adjudges appropriate, from electoral practices and standards in force or effect as of May 9, 2011;

d. Grant plaintiffs appropriate injunctive relief enjoining the defendants, their officers, agents, employees, attorneys, successors in office, and all persons in active concert or participation with them, from any implementation or use of Plan C235 in primary and general elections until and unless the injunction sought in paragraph 27.c is satisfied and the legal violations found with respect to Plan C235 are remedied by the Texas Legislature by a date certain or by this Court :

e. Grant the plaintiffs their reasonable attorney fees, litigation expenses, and costs in maintaining this action; and

f. Grant the plaintiffs such further relief as may be necessary, appropriate, and equitable.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, et al.,	)	
	)	
Plaintiffs	)	CIVIL
	)	ACTION NO.
and	)	SA-11-CA-360-
	)	OLG-JES-XR
MEXICAN AMERICAN	)	(consolidated,
LEGISLATIVE CAUCUS,	)	lead case)
TEXAS HOUSE OF	)	
REPRESENTATIVES (MALC)	)	
	)	
Plaintiffs	)	
v.	)	
	)	
STATE OF TEXAS; RICK	)	
PERRY, In his official capacity as	)	
Governor of the State of Texas;	)	
DAVID DEWHURST, In his	)	
official capacity as Lieutenant	)	
Governor of the State of Texas;	)	
JOE STRAUS, in his official	)	
capacity as Speaker of the Texas	)	
House of Representatives	)	
	)	
Defendants	)	

PLAINITFF MALC'S THIRD AMENDED COMPLAINT

1. This is a redistricting lawsuit. This action is brought pursuant to Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 *et seq.*, and the Fourteenth and Fifteenth Amendments to the United States Constitution, 42 U.S.C. § 1983. Plaintiff brings this action requesting declaratory and injunctive relief against the Defendants to challenge the redistricting plans adopted by the State of Texas for the Texas House of Representatives and United States House of Representatives.

2. Plaintiff brings this action challenging the plans adopted by the State of Texas in 2011 and 2013 for Texas House of Representatives districts (House districts) and for United States House of Representatives districts (Congressional districts). Population growth in the State over the last decade was predominantly Latino and minority. As a result, increased Latino and minority opportunity districts could have and should have been included in the new redistricting plans for both the Texas House districts and the Congressional districts. The plans adopted by the State failed to increase Latino and minority opportunity districts. Instead, the plans were developed to minimize and limit Latino and minority electoral opportunities. These plans, therefore, dilute the voting strength of Latino and minority voters of Texas in violation of Section 2 of the Voting Rights Act.

3. Moreover, both of the sets of challenged plans incorporate many of the same features that were adopted with the purpose of minimizing minority electoral opportunities.

4. Plaintiff also brings this action challenging both the 2011 and 2013 plans adopted by the State of Texas for Texas House districts because the plans used population variances to gain racial and partisan advantage in violation of the Fourteenth Amendmenfs one person, one vote principle.

5. In addition, Plaintiff brings this action challenging the pre-2011 districts for the Texas House ofRepresentatives and the United States House of Representatives in Texas because they also violate the provisions of one person, one vote requirements of the 14th Amendment of the United States Constitution.

6. Plaintiff also brings this action to challenge the manner in which the Defendants applied the redistricting requirement of the Texas Constitution regarding the Texas House of Representatives, embodied in Article III, § 26, commonly referred to as the "whole county rule." The State of Texas' use of Article III,§ 26 in both the 2011 and 2013 enactments, to avoid drawing Latino and minority opportunity districts otherwise required by § 2 of the Voting Rights Act, also violates § 2.

7. The Defendants have enforced Article III, § 26, of the Texas Constitution in a manner that will diminish Latino voting strength. Enforcement of Article III, § 26 in the manner employed by the State has diminished the opportunity of Latino voters of Texas to participate in the political process by limiting the number of majority Latino districts that can be developed consistent with the requirements of the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the United

States Constitution. The Defendants have used the requirements of Article III, § 26 as an excuse to avoid the drawing of Hispanic Citizen Voting Age Population majority districts justified by the significant increase in Latino population over the last decade.

8. The Defendants have also packed and cracked politically cohesive Latino and minority communities, resulting in fewer Latino majority districts in both the 2011 and 2013 enactments.

9. The Defendants also consistently overpopulated Latino majority districts and consistently under-populated majority Anglo districts to limit and diminish Latino voting strength. Such use of population variances violates the one person, one vote rule of the 14th Amendment.

10. With the racial gerrymanders manifest in the 2011 and 2013 plans, which resulted in diminished and limited Latino and African American voting strength, the Defendants violated Section 2 of the Voting Rights Act and the 15th and 14th Amendments.

I. JURISDICTION

11. Plaintiff's complaint arises under the United States Constitution and federal statutes. This court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 1988.

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

13. Plaintiff seeks declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

14. Plaintiff requests convening of a three-judge court pursuant to 28 U.S.C. § 2284.

II. PARTIES

15. Plaintiff, Mexican American Legislative Caucus, Texas House of Representatives (hereinafter MALC), is the nation's oldest and largest Latino legislative caucus. MALC is a non-profit organization established to serve the members of the Texas House of Representatives and their staffs in matters of interest to the Mexican American community of Texas, in order to form a strong and cohesive voice on those matters in the legislative process, including redistricting. Many of its members are elected from and represent constituencies in majority Latino districts and many of its members are Latino. Moreover, some of the members reside in overpopulated Texas House districts and United States House of Representatives districts. The challenged plans incorporate districts that impact on MALC members both as minority voters of the districts and as minority elected representatives.

16. Defendant is the State of Texas. The State of Texas is a political subdivision covered under the provisions of the Voting Rights Act and responsible for the actions of its officials with regard to state-wide redistricting.

17. Defendant Rick Perry is the Governor of the State of Texas. Pursuant to Article IV, § 1 of the Texas

Constitution, he is the chief executive officer of the Defendant State of Texas. He is sued in his official capacity.

III. FACTS

18. Plaintiff MALC is the nation's oldest and largest Latino legislative caucus. MALC is a non-profit organization established to serve the members of the Texas House of Representatives and their staffs in matters of interest to the Mexican American community of Texas, in order to form a strong and cohesive voice on those matters in the legislative process, including redistricting. Many of its members are elected from and represent constituencies in majority Latino districts and many of its members are Latino and some are African American. Some of the members of MALC reside in and represent districts that have population substantially greater than the ideal district size for those types of districts. Moreover, the members ofMALC are registered voters in Texas and participate in state and local elections.

19. On or about February 17, 2011, the United States Department of Commerce and the United States Census Bureau released to the State of Texas the population data gathered as a result of the conduct of the 2010 Census.

20. The information released to the State of Texas showed that the population of Texas had increased to 25,145,561 for 2010. The population of Texas, according to the 2010 Census, had increased over the decade by about 20% from the 2000 population of 20,851,820.

21. According to the 2010 Census, the Hispanic population of Texas grew to 9,460,921 from 6,669,666 in the 2000 Census. This was an increase of about 42%. Moreover, according to the 2010 Census, Hispanic growth accounted for about 65% of the overall growth of Texas.

22. The numbers released to the State of Texas by the Census Bureau in February of 2011 have been used to redistrict the Texas House of Representatives. The redistricting legislation for the Texas House districts, H.B. 150, was signed by the Governor on June 17, 2011. The redistricting legislation for the United States House of Representatives, S.B. 4, was passed by the Texas Legislature on or about June 15, 2011.

23. The 2011 enactment for redistricting of the Texas House of Representative never became effective in law. The District Court for the District of Columbia determined that the 2011 plan for the Texas House diminished or retrogressed minority voting strength in a number of districts. It also determined that the "full record strongly suggests that the retrogressive effect we have found may not have been accidental." *Texas v. United States*, 887 F. Supp. 2d 133, 177-178, (D.D.C. 2012) vacated and remanded on other grounds, 570 U.S.____, 2013 U.S. LEXIS 4927 (U.S., June 27, 2013).

24. With regard to the Texas House plan, the D.C. Court found that the enacted plan had the "effect of abridging minority voting rights in four ability districts- HD's 33, 35, 117 and 149- and that Texas did not create any new ability districts to offset those losses." *Id.* at 51. Thus, the enacted plan was retrogressive and could not be

precleared. *Id.* The D.C. Court also expressed concern about the manner in which the mapdrawers used "deliberate, race-conscious method[s]" to dilute minority voting power, specifically noting the manner in which they switched high-turnout for low-turnout Hispanic voters and cracked VTD's along racial lines. *Id.* at 70-71.

25. However the 2011 Texas House enactment was abandoned by the State of Texas with the enactment in 2013 of S.B. 3. S.B. 3 (H358) maintained most of the districts exactly as they were adopted in 2011 and made modifications primarily based on a Court Ordered Interim Redistricting plan.

26. The 2011 enactment for redistricting of the United States House of Representatives (Congressional Districts) never became effective in law. The District Court for the District of Columbia determined that the 2011 plan for the Texas Congressional districts diminished or retrogressed minority voting strength in a number of districts and also found that Texas engaged in intentional discrimination against African-American and Latino citizens in enacting the 2011 Congressional redistricting plans. *Id.* at 161.

27. The 2011 enactment by the State of Texas of Congressional districts was abandoned by the State of Texas with the enactment of S.B. 4 (C235).

28. According to the 2010 Census, the pre-2011 redistricting for the Texas House of Representatives districts had population disparities between the most and least populated district, or a "top to bottom deviation," of

over 109%. This population disparity far exceeds the allowable deviation under the United States Constitution. The overpopulated districts for the Texas House of Representatives include District 40 in Hidalgo County, with a deviation of over +28%, and District 36 in Hidalgo County, with a deviation of over +20%.

29. According to the 2010 Census, the pre-2011 redistricting for the Texas Congressional districts had population disparities between the most populated and least populated districts, or "top to bottom" deviation, of over 48%. This population disparity far exceeds the allowable deviation under the United States Constitution. The overpopulated districts for the United States House of Representatives include District 15 in Hidalgo County, with a deviation of over+ 12%, and District 28 in Hidalgo County, with a deviation of about +22%.

30. The United States Supreme Court recently explained and articulated that the standard for compliance with the one person, one vote principle does not provide a complete safe harbor, even when a plan has less than a 10% total deviation. Unless the jurisdiction can articulate a legitimate non-racial, non-political reason for its deviation, districts should be as equal in population as is practicable. *Cox v. Larios*, 159 L. Ed. 2d 831, 833 (2004).

31. The State's pre-2011, 2011, and 2013 redistricting plans contain deviations that far exceed permissible limits under the United States Constitution. As described above, both of the pre-2011 plans for Texas House of Representatives and United States House of Representatives far exceed permissible deviation limits.

Moreover, the 2011 and 2013 plans adopted by the State of Texas for the Texas House of Representatives, have a top to bottom deviation of 9.9% and 9.85% respectively. These deviations were achieved by overpopulating a majority of the Latino majority districts that can be overpopulated and under-populating a majority of Anglo majority districts. The deviation cannot be justified by legitimate state redistricting interests.

32. Elections in Texas continue to be racially polarized.

33. Latinos generally vote as a group and are politically cohesive.

34. African Americans in Texas generally vote as a group and are politically cohesive.

35. Latinos and African Americans in Texas generally vote as a group and are politically cohesive.

36. Anglos in Texas generally vote as group, are politically cohesive, and vote sufficiently as a block to defeat the preferred candidate of Latino and African American voters absent fair and equitable majority-minority single-member districts.

TEXAS HOUSE

37. According to the 2010 Census the Latino population of Midland County grew by over 57.05% while non-Hispanic white population diminished grew by only 1.1%. In addition the Latino population of Ector County grew by over 40.98% while the non-Hispanic white population diminished over the decade in Ector County.

38. Pre-textually, the Defendants asserted that in its efforts to comply with Article III, § 26 of the Texas Constitution, they would not to explore, consider or develop a Latino citizen voting age population majority district in the Midland/Odessa area of West Texas.

39. Counsel to the Committee on Redistricting, Mr. Jeff Archer, advised that where Section 2 districts were available, the requirements of Article III, § 26 would have to yield.

40. During the Legislative sessions in 2011 and during Special Session of the Legislature in 2013 on redistricting, amendments to the enacted plans with putative redistricting plans were offered, in committee and on the House floor, by the Chairman of the MALC, Rep. Trey Martinez Fischer, and others that established that compact and contiguous districts anchored in Midland and Odessa with a Latino citizen voting age population of over 50% were available. A similar district created in a multi-county district based in Lubbock, was also demonstrated by the amendments offered by the Chairman of MALC.

41 During the debate on the amendments offered by Rep. Martinez Fischer and others, the sponsor of the redistricting bills explained that the amendments would have to be rejected because they violated the requirements of Article III, § 26.

42. The 2011 enactment for redistricting the State House of Representatives eliminated a majority Latino citizen voting age population district in Nueces County.

43. The 2013 enactment for redistricting the State House of Representatives, S.B. 3 continues to exclude the majority Latino citizen voting age population district in Nueces County.

44. During the Legislative Special Session on redistricting in 2013, an amendment to S.B. 3 with putative redistricting plans was offered, on the House floor, by the Chairman of the MALC, Rep. Trey Martinez Fischer. This amendment established that an additional compact and contiguous district, anchored in Nueces County, with a Latino citizen voting age population of over 50% was available.

45. During the debate on the amendments offered by Rep. Martinez Fischer, the sponsor of the redistricting bills explained that the amendment would have to be rejected because it violated the requirements of Article III, § 26.

46. According to the 2010 Census, the total population of Harris County is 4,029,459. The ideal district size in 2011 for the Texas House of Representatives, according to the 2010 Census, is 167,637 persons. Therefore, the number of ideal districts for Harris County is 24.41.

47. In its efforts to comply with Article III, § 26 of the Texas Constitution, Texas allocated 24 districts to Harris County for the 2011 redistricting cycle and was maintained at that level in the State's 2013 enactment.

48. In prior litigation, this Court developed an interim redistricting plan for Harris County that created one additional Latino opportunity district above that contained in the 2011 enactment (H.D. 144). S.B. 3 includes that district.

49. However, population growth justifies the addition of at least one more minority opportunity district in Harris County.

50. During the Legislative Special Session on redistricting in 2013, an amendment to S.B. 3 with putative redistricting plans was offered, on the House floor, by the Chairman of the MALC, Rep. Trey Martinez Fischer. This amendment established that an additional compact and contiguous district, anchored in Harris County, with a minority citizen voting age population of over 50% was available.

51. In Fort Bend County, the minority population over the decade increased by over 95.59%. Fully, 79.26% of the population growth in Fort Bend County was minority population growth. Yet, no new minority opportunity districts are contained in S.B. 3 in the Fort Bend County area. Instead the minority population of Fort Bend County was unnecessarily fragmented to minimize its political strength in both the 2011 enactment and the 2013 enactment.

52. During the Legislative Special Session on redistricting in 2013, an amendment to S.B. 3 with putative redistricting plans was offered, on the House floor, by the Chairman of the MALC, Rep. Trey Martinez

Fischer. This amendment established that an additional compact and contiguous district, anchored in Fort Bend County, with a minority citizen voting age population of over 50% was available.

53. Neither the 2011 enacted plan nor the 2013 enacted plan for the Texas House of Representatives contains such a district in the Fort Bend County area.

54. In Bell County, African American and Latino population growth exceeded over 51.64%. In the City of Killeen in Bell County, the minority community is geographically compact and politically cohesive. Both the 2011 enacted plan and the 2013 enacted plan, S.B. 3, unnecessarily fragments the minority community of Killeen to minimize its political impact on Texas House elections.

55. During the Legislative Special Session on redistricting in 2013, an amendment to S.B. 3 with putative redistricting plans was offered, on the House floor, by the Chairman of the MALC, Rep. Trey Martinez Fischer and by Representative Yvonne Davis. These amendments established that an additional compact and contiguous district, anchored in Bell County, with a minority citizen voting age population of over 50% was available.

56. Neither the 2011 enacted plan nor the 2013 enacted plan for the Texas House of Representatives contains such a district in Bell County.

57. Defendants also have employed redistricting gerrymandering techniques such as packing, cracking, and overpopulating minority Texas House districts in order to minimize minority opportunity districts. For instance, fragmentation of minority population while at the same time overpopulating Latino majority districts in Dallas County led to the failure to create at least one and possibly two additional minority opportunity house districts in Dallas County in both 2011 and 2013. Plans that reduced the population variance in Latino districts and reduced the fragmentation of minority voters in Dallas County were offered as amendments in both 2011 and 2013 and were rejected.

58. The 2011 enacted plan also actively disenfranchised Latino voters in Bexar County, Texas. In 2010, in HD 117, a state representative district in western Bexar County, elected a Hispanic Republican named John Garza. In creating a district to safely re-elect Rep. Garza the state impermissibly focused on race by targeting low-turnout Latino precincts. The HCVAP was increased to 63.8%, but the Spanish Surname Voter Registration (SSVR) actually decreased. The State clearly focused on low-turnout Latino precincts. The State's intention was made all the more clear by Rep. Garza's admission that he "wanted to get more Anglo numbers" into his district is further evidence of racial gerrymandering and evidence of racially discriminatory intent.

59. The 2011 enacted plan was also infected with discriminatory purpose because of the State's actions in El Paso County, Texas in the State House Plan. The border between HDs 77 and 78 had a bizarre shape with

"deer antler" protrusions that split multiple precincts between these two districts. The high number of precincts splits within the deer antler protrusions strongly indicates that the State sought to divide these voters along racial lines. To date, the State has offered no explanation as to why the precincts were split. These cartographic choices are strong evidence of racially discriminatory intent.

TEXAS CONGRESSIONAL DISTRICTS

GENERALLY

60. As a result of the 2010 Census, the Texas Congressional delegation for the United States House of Representatives increased from 32 to 36 members.

61. The increase in the Texas Congressional delegation was directly attributable to the growth in Latino and minority population growth in the State; yet the Defendants failed to increase the number of minority Congressional opportunity districts, beyond those created by this Court.

62. The population growth of Latino and minority population in South and Central Texas justifies the creation of an additional minority opportunity Congressional district in the South/Central Texas region.

63. During the Legislative Sessions on redistricting in 2011 and 2013, amendments to the enacted plans with putative redistricting plans were offered, by a number of minority Representatives. These amendments established that additional compact and contiguous districts with a minority citizen voting age population of

over 50% were available. These plans were never seriously considered.

CONGRESSIONAL DISTRICT 23

64. A detailed review of the legislative history of the 2011 enactments shows that the State's mapdrawers consciously replaced many of the district's active Hispanic voters with low-turnout Hispanic voters in an effort to strengthen the voting power of CD 23's Anglo citizens. In other words, they sought to reduce Hispanic voters' ability to elect without making it look like anything in CD 23 had changed. As a result, the district court for the district of Columbia found that in the 2011 enactment CD 23 was a lost ability to elect minority district. *Texas v. United States*, 887 F. Supp. 2d at 155-7. CD 23 in the 2013 enactment is identical to the CD 23 contained in the interim plan in *Perez v. Perry* developed as a result of a finding that Plaintiffs claims there were not insubstantial. However, the district insufficiently augments Latino voting strength to remedy the intentional attempt to diminish Latino voting strength in CD 23.

CONGRESSIONAL DISTRICT 27

65. The current 27th District is anchored in Nueces County and represented by Congressman Farenthold. Before Rep. Farenthold's election, the 27th District had been represented by Solomon Ortiz, Sr. The geography of the old 27th District was made up of parts of Cameron and San Patricio Counties and all of Nueces, Willacy, Kleberg, and Kenedy Counties.

66. The new 27th District joins Nueces County with heavily Anglo counties to its north: all of Refugio,

Aransas, Calhoun, Matagorda, Jackson, Victoria, Wharton, and Lavaca Counties; and parts of San Patricio, Gonzales, Caldwell, and Bastrop Counties. Nueces County has a population of 340,223, of which 206,293 are Hispanic, or 60.635% of the population of the County. The Counties that Nueces has been combined with to form the new 27th District have a Hispanic population of only 39.92%, effectively diluting the voting strength of the Hispanics of Nueces County.

67. The voting strength of the Latino population of Nueces County has thus been diminished in both the 2011 and 2013 enactment.

CONGRESSIONAL DISTRICT 25

68. Congressional District 25 was an effective crossover district in pre-2011 plan. The District Court for the District of Columbia found that the elimination of CD 25 as an effective crossover district is a retrogression of minority voting strength. Retrogression of minority voting strength is a per se violation of Section 2 of the Voting Rights Act.

69. Both the 2011 and 2013 Texas enactments of redistricting plans for congressional districts eliminate CD 25 as an effective crossover district.

INTENTIONAL DISCRIMINATION

70. Latinos and African Americans in Texas continue to suffer the effects of historical discrimination in the areas of education, income, and housing. In addition, primary elections in Texas continue the use of majority vote requirements. Elections in Texas still require the use

of place system and majority vote. Primaries in Texas require a majority vote to secure election. In addition, racially polarized voting continues to infect elections at all levels of government. Texas has a long history of discrimination against minorities in voting. Finally, Latinos in Texas continue to be under-represented in the Texas House and the Texas delegation to the United States House of Representatives.

71. In the enactment of redistricting plans in both 2011 and 2013 Texas established rules different from what is used with enactments generally thus departing from traditional practices. For example, special rules for accepting amendments that precluded all but the most inconsequential changes were used in the 2013 redistricting enactments. For instance no changes would be accepted but those agreed to by all affected members. Even so, in the 2013 session, among the few acceptable amendments was one that resulted in a retrogression of minority voting strength in HD 90. The Texas House and Senate in both 2011 and 2013 passed redistricting legislation without serious consideration of minority voting interests.

72. In both 2011 and 2013, the redistricting enactments passed by Texas make substantial intrusions into cohesive minority communities, fragmenting minority voting communities and diminishing minority voting strength throughout the maps.

73. Latino and African American voters in Dallas and Tarrant Counties have been splintered and fragmented in both 2011 and 2013 to diminish their ability to effectively

participate in the political process. Elimination of the unconstitutional fragmentation when combined with the significant population growth of the area will naturally result in an additional minority majority congressional district and one to three new Texas House Districts in Dallas County.

FIRST CLAIM FOR RELIEF-DISCRIMINATORY RESULT

74. The allegations contained in paragraphs 1 through 73 are alleged as if fully set forth herein.

75. Plaintiff's cause of action arises under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. The Defendants are in violation of the Voting Rights Act because the State Defendants: have failed provide sufficient Latino and minority opportunity districts in the 2011 and 2013 redistricting enactments in the face of racial bloc voting and dramatic minority population growth; employed redistricting gerrymandering techniques such as packing and cracking of minority communities to limit and have avoided drawing Latino and minority opportunity districts in; used redistricting criteria, such as the "whole county" rule in an inconsistent and unjustifiable pretext to limit and avoid drawing Latino and minority opportunity districts for Texas House redistricting plans. The failure of the Defendants to draw additional Latino and minority opportunity districts; the Defendants use of racial gerrymandering techniques such as cracking and packing Latino and minority population to limit the number of Latino and minority opportunity districts drawn; the Defendants' use of redistricting criteria unevenly and as a pretext to limit

the number of Latino opportunity districts; all work together to result in a violation ofthe rights of Plaintiff as secured by Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

SECOND CLAIM FOR RELIEF–INTENTIONAL DISCRIMINATION AND DISCRIMINATORY EFFECT

76. The allegations contained in paragraphs I through 73 are alleged as if fully set forth herein.

77. The election practices and procedures used to apportion and draw Texas House districts statewide in both 2011 and 2013, and in particular to Bexar, El Paso, Nueces, Harris, Dallas, Tarrant, Midland, Ector, Bell, Lubbock, and Fort Bend Counties, was done in such a fashion and with the intent to disadvantage Latino and minority voters and resulted in a discriminatory effect on minority voters in Texas. Based on the totality of the circumstances, the political process used by the State Defendants to allocate and draw Texas House seats in Texas Counties, and Bexar, El Paso, Bell, Fort Bend, Nueces, Harris, Dallas, Tarrant, and West Texas in particular, violates the rights of Latino voters in violation of Section 2 of the Voting Rights Act as well as the Fourteenth and Fifteenth Amendments of the United States Constitution and 42 U.S.C. § 1983.

78. In addition, the Texas House districting plans adopted by the Texas House of Representatives in 2011 and 2013 have a total or top to bottom deviation of 9.9% and 9.85% respectively. These deviations were achieved by overpopulating Latino majority districts, to avoid

drawing new Latino majority districts and to gain political advantage. Therefore, the manipulation ofthe population deviation to 9.9% and 9.85% has a discriminatory effect on Latino voters and violates the one person one vote principle of the 14th Amendment as well as Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

THIRD CLAIM FOR RELIEF-ONE PERSON, ONE VOTE

79. The allegations contained in paragraphs 1 through 73 are alleged as if fully set forth herein.

80. The pre-2011 redistricting plans for the Texas House of Representatives and United States House of Representatives exceed permissible population variances between the least populated district and the most populated district. The implementation of such variances or deviations from ideal population by Defendants violate the rights of all voters and persons as guaranteed by the one person, one vote principle embodied within the Fourteenth Amendment of the United States Constitution and protected by 42 U.S.C. § 1983.

81. In addition, the Texas House districting plan adopted by the Texas Legislature in both 2011 and 2013 have total or top to bottom deviations of 9.9% and 9.85% respectively. These deviations were achieved by overpopulating Latino majority districts, to avoid drawing new Latino majority districts and to minimize the opportunity of Latino voters to participate in the political process. There is no legal justification for maintaining a deviation of 9.9% or 9.85% when there is such an impact on Latino voting strength. These 9.9% and 9.85%

deviations violate the one person, one vote principle of the Fourteenth Amendment of the United States Constitution as protected by 42 U.S.C. § 1983. respectively.

82. With respect to the first, second, and third claims for relief, this is also an action for declaratory judgment and preliminary and permanent injunctive relief instituted pursuant to 42 U.S.C. § 1973, 42 U.S.C. § 1983, and 28 U.S.C. § 2001.

83. With respect to the first, second, and third claims for relief, Plaintiff seeks a declaration that the actions of the State Defendants in the 2013 redistricting cycle violate their rights as secured by the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the United States Constitution. Plaintiff also seeks to enjoin any further use of the pre-2011, the 2011 and the 2013 plans for the Texas House and United States House of Representatives.

BASIS FOR EQUITABLE RELIEF

84. Plaintiff has no plain, adequate, or complete remedy at law to redress the wrongs alleged herein and this suit for declaratory judgment and injunctive relief is their only means of securing adequate redress from all of the Defendants' unlawful practices.

85. Plaintiff will continue to suffer irreparable injury from all of the Defendants' intentional acts, policies, and practices set forth herein unless enjoined by this Court.

PRAYER

Plaintiff respectfully prays that this Court enter Judgment granting Plaintiff:

A. A declaratory judgment that State Defendants' actions violate the rights of Plaintiff as protected by Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 *et seq.* and that the actions of Defendants violate the rights of Plaintiff as protected by the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. § 1983;

B. Preliminary and permanent injunctive relief requiring the State Defendants, their successors in office, agents, employees, attorneys, and those persons acting in concert with them and/or at their discretion to develop redistricting plans that do not dilute Latino and minority voting strength for the Texas House of Representatives and the United States House of Representatives, and also enjoining and forbidding the use of the current Congressional and State House redistricting plans.

C. An order requiring all Defendants to comply with Section 2 and comply with the Section 5 preclearance requirements of the Voting Rights Act as provided by Section 3(c) of the Act;

E. The costs of this suit and reasonable attorneys' fees and litigation expenses, including expert witness fees and expenses, pursuant to 42 U.S.C. §§ 1973l(e) and 1988.

F. An order of this Court retaining jurisdiction over this matter until all Defendants have complied with all orders and mandates of this Court; and

G. Such other and further relief as the Court may deem just and proper.

DATED: September 17, 2013 Respectfully Submitted,

/s/ Jose Garza

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**ATTORNEYS FOR
MEXICAN AMERICAN
LEGISLATIVE CAUCUS,
TEXAS HOUSE OF REP.
(MALC)**

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, *et al.*,	)	
	)	CIVIL
Plaintiffs,	)	ACTION NO.
	)	SA-11-CA-360-
v.	)	OLG-JES-XR
	)	[Lead case]
STATE OF TEXAS, *et al.*,	)	
	)	
Defendants.	)	
	)	
	)	
MEXICAN AMERICAN	)	CIVIL
LEGISLATIVE CAUCUS,	)	ACTION NO.
TEXAS HOUSE OF	)	SA-11-CA-631-
REPRESENTATIVES (MALC)	)	OLG-JES-XR
	)	[Consolidated
Plaintiffs,	)	case]
	)	
v.	)	
	)	
STATE OF TEXAS, *et al.*,	)	
	)	
Defendants.	)	
	)	
	)	
TEXAS LATINO	)	CIVIL
REDISTRICTING TASK	)	ACTION NO.
FORCE, et al.,	)	SA-11-CV-490-
	)	OLG-JES-XR

Plaintiffs,	)	[Consolidated
	)	case]
v.	)	
	)	
RICK PERRY, *et al.,*	)	
	)	
Defendants.	)	
	)	
	)	
MARGARITA V. QUESADA, *et al.,*	)	CIVIL
	)	ACTION NO.
	)	SA-11-CA-592-
Plaintiffs,	)	OLG-JES-XR
	)	[Consolidated
v.	)	case]
	)	
RICK PERRY, *et al.,*	)	
	)	
Defendants.	)	
	)	
	)	
JOHN T. MORRIS,	)	CIVIL
	)	ACTION NO.
Plaintiff,	)	SA-11-CA-615-
	)	OLG-JES-XR
v.	)	[Consolidated
	)	case]
STATE OF TEXAS, et al.,	)	
	)	
Defendants.	)	
	)	
EDDIE RODRIGUEZ, et al.	)	CIVIL ACTION NO.

Plaintiffs,	)	SA-11-CA-365-OLG-JES-XR [Consolidated case]
v.	)	
RICK PERRY, et al.,	)	
Defendants.	)	

QUESADA PLAINTIFFS' THIRD AMENDED COMPLAINT

Plaintiffs MARGARITA V. QUESADA, ROMEO MUNOZ, MARC VEASEY, JANE HAMILTON, LYMAN KING, JOHN JENKINS, KATHLEEN MARIA SHAW, DEBBIE ALLEN, JAMAAL R. SMITH, and SANDRA PUENTE, allege:

I. Introduction

1. On June 15, 2011, the Texas Legislature enacted Senate Bill 4 (S.B. No. 4, as amended), which proported to establish a new congressional redistricting plan for the State of Texas (hereafter, "Plan C185" or "the State's 2011 Congressional Plan" or the State's 2011 Plan").

2. Plaintiffs filed this action seeking declaratory and injunctive relief to prevent Defendants from using the State's 2011 Congressional Plan in any future elections. Plaintiffs brought this action pursuant to the United States Constitution and 42 U.S.C. § 1983, as well as 42 U.S.C. §1973 (Section 2 of the Voting Rights Act of 1965, as amended) and 42 U.S.C. § 1973c (Section 5 of the Voting Rights Act of 1965, as amended). The State's 2011

Congressional Plan would have harmed minority voters, including Plaintiffs, in several discrete ways. The injury to African-American and Hispanic voters throughout the State caused by the reconfiguration of the congressional districts in the State's 2011 Congressional Plan was neither necessary nor justified.

3. The State's 2011 Congressional Plan was drawn to insure that population gains in minority communities (primarily African-American and Hispanic) from 2000 to 2010 did not afford minority voters increased electoral opportunity under the State's Plan. Though minority communities accounted for nearly 90% of population growth between 2000 and 2010, and Texas received four additional congressional seats because of that explosive population growth, minority voters only were afforded an effective ability to elect a candidate of choice in only one of the four new districts created under the State's Plan. And though the Anglo population now comprises only 45% of Texas' total population, Anglos would have controlled 72% of Texas' congressional districts under the State's 2011 Congressional Plan. This configuration constituted an unlawful dilution of minority voting strength under Section 2 of the Voting Rights Act, and the Fourteenth and Fifteenth Amendments to the United States Constitution.

4. The State's 2011 Congressional Redistricting Plan was drawn with the purpose, and had the effect, of minimizing and reducing the strength of minority populations in Texas. While the pre-2011 congressional map contained eleven effective minority opportunity districts, the State's 2001 Congressional Plan contained only ten such districts. Reducing the number of effective

minority opportunity districts in the face of minority population growth was intentional discrimination in violation of Section 2 of the Voting Rights Act, and the Fourteenth and Fifteenth Amendments to the United States Constitution. Such a reduction of effective minority opportunity districts also constituted unlawful retrogression under Section 5 of the Voting Rights Act. The State's 2011 Plan also violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, by significantly minimizing the opportunities for African-American and Hispanic voters to participate in the political process and to elect Representatives of their choice.

II. Jurisdiction and Venue

5. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 1357, and 2284; and pursuant to 42 U.S.C. §§ 1973c, 1973j(f). Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201, 2202, and 2284, as well as by Rules 57 and 65 of the Federal Rules of Civil Procedure. Venue is proper pursuant to 28 U.S.C. §§ 1391(b).

III. Parties

6. Plaintiffs are citizens and registered voters residing in the current congressional Districts 6, 9, 18, 20, 24, 29, 30 and 33. Plaintiffs have standing to bring this action under 42 U.S.C. § 1983 to redress injuries suffered through the deprivation, under color of state law, of rights secured by the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973, 1973c, and by the United States Constitution.

7. Plaintiff MARGARITA V. QUESADA is an Hispanic citizen and a registered voter whose address is 875 Marquette Drive, San Antonio, Texas 78228. She resides in the current District 20 and under the State's Plan would reside in proposed District 20.

8. Plaintiff ROMEO MUNOZ is an Hispanic citizen and a registered voter whose address is 4157 Astoria, Irving, Texas 75062. He resides in current District 24 and under the State's Plan would reside in proposed District 24.

9. Plaintiff MARC VEASEY is an African-American citizen and a registered voter whose address is 8224 Longfellow Lane, Fort Worth, TX 76120. He resides in current District 33 in the court-approved interim plan (and under the State's 2011 Plan would have resided in proposed District 12). Plaintiff VEASEY is also the duly elected Congressman in Congressional District 33.

10. Plaintiff JANE HAMILTON is an African-American citizen and a registered voter whose address is 1111 South Akard St., Unit 310, Dallas, TX 75215. Plaintiff HAMIL TON resides in current District 30 and under the State's Plan would reside in proposed District 30.

11. Plaintiff LYMAN KING is an African-American citizen and a registered voter whose address is 2600 Piazza Court #5, Grand Prairie, TX 75054. Plaintiff KING resides in current District 24 and under the State's Plan would reside in proposed District 6.

12. Plaintiff JOHN JENKINS is an African-American citizen and a registered voter whose address is 6723

Smallwood, Arlington, Texas 76001. Plaintiff JENKINS resides in current District 6 and under the State's Plan would reside in proposed District 33.

13. Plaintiff KATHLEEN MARIA SHAW is an African-American citizen and registered voter whose address is 812 Parkside Drive, Cedar Hill, TX 75104-3144. She resides in the current 24th Congressional District and under the State's Plan would reside in Congressional District 30.

14. Plaintiff DEBBIE ALLEN is an African-American citizen and a registered voter whose address is 1514 Pleasantville Drive, Houston, TX 77029. She resides in the current Congressional District 18 and under the State's Plan would reside in proposed District 18.

15. Plaintiff JAMAAL R. SMITH is an African-American citizen and a registered voter whose address is Windriver Park Townhomes, 3901 Woodchase Drive Unit 36, Houston, Texas 77042. He resides in the current Congressional District 9 and under the State's Plan would reside in proposed District 9.

16. Plaintiff SANDRA PUENTE is an Hispanic citizen and a registered voter whose address is 608 Wainwright Street, Houston, TX 77022. She resides in the current Congressional District 29 and under the State's Plan would reside in proposed District 29.

17. Defendant RICK PERRY is the Governor of the State of Texas and chief executive officer of the State of Texas. Defendant PERRY is sued in his official capacity.

18. Defendant JOHN STEEN is Texas Secretary of State. Defendant STEEN is sued in hIS official capacity. Defendant STEEN is responsible for administering and supervising the elections of United States Representatives from the State of Texas.

IV. Facts

Reapportionment

19. Every ten years, under 2 U.S.C. § 2a, the President of the United States must transmit to Congress a statement showing the number of persons in each state and the number of representatives to which the state is entitled. These figures are tabulated according to the federal decennial census.

20. On or about December 21, 2010, the Secretary of Commerce of the United States reported to the President of the United Sates the tabulation of population for each of the fifty states, including the State of Texas, as determined in the 2010 decennial census.

21. Under 13 U.S.C. § 141, commonly referred to as—Public Law 94-171,I the Secretary of Commerce was required, by April 2, 2011, to complete, report, and transmit to each state the detailed tabulations of population for specific geographic areas within each state. States ordinarily use the P.L. 94-171 data to redraw Congressional districts.

22. The United States Bureau of the Census delivered to Texas Governor Rick Perry and the leaders of the

Texas legislature the official Census 2010 Redistricting Data Summary File pursuant to P.L. 94-171.

23. Because of demographic changes recorded in the 2010 U.S. census, Texas received four additional congressional districts during this reapportionment. The four additional seats gave Texas a total allotment of 36 congressional seats.

24. The demographic changes that occurred in Texas and were recorded in the 2010 U.S. census were driven by explosive growth in the state's Hispanic and African-American populations. Hispanic growth was responsible for 65% of the state's population growth, and non-Anglo population accounted for approximately 90% of the State's overall population growth. The Latino population grew at 10 times the rate of the Anglo population, and the African American population grew at more than 5 times the rate of the Anglo population.

25. Today, Texas is a majority-minority state; only 45% of its total population is Anglo.

The Voting Rights Act

26. Section 2 of the Voting Rights Act, 42 U.S.C. §1973 prohibits any new redistricting plan that dilutes the voting strength of minority communities. Where minority communities have diminished opportunity to elect candidates of their choice, their voting strength has been diluted, and so unlawfully abridged under Section 2 of the Act.

27. On September 25, 1975, the Voting Rights Act of 1965 was extended and amended to cover the State of Texas. State and political subdivisions covered by the Act must comply with certain procedures under the Act, as amended, 42 U.S.C. §1973(c). Among them was the Section 5 preclearance requirement that certain States and political subdivisions must show that any new redistricting plan—does not have the purpose and will not have the effect of denying or abridge the right to vote on account of race or color or membership in a language minority group. To make this showing, Texas was required to demonstrate that those drafting its redistricting plan did not possess racially discriminatory intent, and that the adopted plan did not cause a retrogressive effect with respect to minority voting strength.

28. On June 25, 2013, the Supreme Court decided *Shelby County v. Holder*, 570 U.S. ___, 2013 WL 3184629 (U.S. June 25, 2013) (No. 12-96). In *Shelby County*, the Supreme Court held that the coverage formula in Section 4(b) of the Voting Rights Act, as reauthorized by the Voting Rights Act Reauthorization and Amendments Act of 2006, is unconstitutional and "can no longer be used as a basis for subjecting jurisdictions to preclearance" under Section 5 of the Act. *See* slip. op. at 24. The Supreme Court indicated it was issuing no holding on Section 5 itself, only on the coverage formula. *Id.* Consequently, Texas is no longer a covered jurisdiction as defined in Section 4 of the Act.

The Racially Discriminatory Redistricting Process in Texas in 2011

29. The State's 2011 Redistricting Plan was developed without any meaningful input from the minority population's representatives of choice or the general public. During the regular legislative session, for example, only one hearing on congressional redistricting was convened in the House redistricting committee and only one hearing was convened in Senate redistricting committee. No plan was presented in either hearing. Thus, there were no opportunities for members of the general public or representatives of communities of color to have any input into the development of the State's 2011 Plan.

30. Legislators who represent communities of color were not permitted to discuss the plan with Republican leadership until after that leadership had already agreed to a map. Governor Perry signaled that this exclusion was intentional in discussions with a Texas Tribune reporter. On May 28, 2001, the Tribune reported that Governor Perry would only call legislators back into special session—when they get to an agreed bill.

31. Minority members of the House and Senate, and minority members of the two legislative redistricting committees, never saw the state's 2011 plan until it was made public on Tuesday, May 31, 2011.

32. Despite the absence of meaningful participation for officials representing minority communities, the Texas Legislature enacted the plan into law on June 15, 2011.

The Pre-2011 Baseline Map

33. The congressional map that existed as of 2010 ("C100") was a thirty-two district map that had eleven districts in which minority voters had successfully elected candidates of choice within the past decade.

34. Of the eleven minority opportunity districts in C100, seven were effective Hispanic opportunity districts. Those Districts were: 15th – Hinojosa; 16th – Reyes; 20th – Gonzalez; 23rd – Canseco; 27th – Farenthold; 28th – Cuellar; and the 29th – G. Green.

35. Although Districts 23 and 27 in Plan C100 did not elect the Hispanic candidate of choice in the 2010 election, they did elect the Hispanic candidate of choice in every previous election.

36. Of the eleven existing minority opportunity districts in Plan C100, three were effective African-American opportunity districts. Those Districts are: 9th – A. Green; 18th – Jackson Lee; and the 30th – Johnson.

37. Of the eleven existing minority opportunity districts, one district allowed a coalition of minority voters and like-minded Anglo voters to elect a candidate of choice. That District is the 25th – Doggett.

The State's Proposed 2011 Map (C185), Viewed Statewide

38. Under the State's 2011 proposed Congressional plan (C185), Anglo voters would have controlled 72% of Texas' congressional districts and three of the four new congressional districts.

39. Under Plan C185, only ten districts provided minority voters with an effective opportunity to elect candidates of choice, one less than the previous plan (C100). This was so, despite the four additional congressional seats that Texas received as a direct result of the explosive population growth in Texas's Latino and African American communities.

40. Under the State's 2011 Plan (C185), Districts 34 and 35 were not "new" Hispanic opportunity districts, as State officials claimed.

41. District 34 as drawn in Plan C185 replaced an existing effective Hispanic opportunity district, District 27. District 34 was drawn in the State's Plan apparently because alterations to District 27 shifted control of the District from Latino voters to Anglo voters. Thus, District 34 was not a "new" Hispanic district; it was a replacement district for District 27, which was converted to an Anglo-dominated district.

42. Under Texas' 2011 plan (C185), District 35 replaced District 23, which was transformed from an effective Hispanic opportunity district to an Anglo-controlled district by including high turnout Anglo precincts into the district. The shift was effected by exchanging selected precincts in Bexar and El Paso Counties, and by extending District 23 across the Franklin Mountains into the west side of El Paso. As explained by Dr. Henry Flores at trial in Perez v. Perry, No. 11-cv-360 (see Trial Tr. 450:19-454:11, Sept. 7, 2011), Hispanic voter turnout was higher in areas moved out of the district than in areas

that were moved in; turnout in some excluded areas was consistently over 30%, while turnout in areas that replaced them was only 25-30%). The changes were made by the State in its 2011 plan with an intent to "nudge" a district that was an ability district, but barely so, to a nonperforming district. Even Texas's expert testified in this case that CD 23 under Plan C185 "is probably less likely to perform than it was, and so I certainly wouldn't count and don't [and] haven't counted the 23rd as an effective minority district in the newly adopted plan." See Trial Testimony of Dr. John Alford (Trial Tr. 1839:2-7, Sept. 14, 2011, *Perez*, No. 11-cv-360). Thus, CD 23 was an ability to elect district in the benchmark plan (Cl00), but would not have been an ability to district under Plan C185.

43. Even if the State's 2011 plan (C185) had maintained the number of minority opportunity districts at eleven, doing so despite the addition of four new congressional seats in the face of the dramatic population growth constituted unlawful retrogression and dilution. Minority voters in Texas under the pre-2011 plan (Cl00) were able to elect their preferred candidate of choice in 11 of the 32 districts (or 34.4%) of the districts. Even if the State of Texas had maintained all eleven of these effective minority districts in Pan Cl85, minorities would only have been able to elect their preferred candidate of choice in 11 of 36 districts (or 30.5%). Under the State's 2011 Plan, minority voters would only have been able to elect the candidate of choice in ten congressional districts, or 27.7% of the districts.

The State's Proposed 2011 Congressional Map (C185), Viewed Regionally

44. The State's proposed 2011 Congressional redistricting plan (C185) created egregious electoral disparities in North Texas. In the Dallas-Ft. Worth region, comprised of Dallas and Tarrant Counties, 2.1 million Hispanics and African-Americans comprise 52% of the population. The State's Plan provided these minority communities with the opportunity to elect only one candidate of their choice out of eight congressional districts in this region of the State, or 12.5% of the locality's representatives. None of the five districts that include all or part of Tarrant County provided an effective electoral opportunity for Hispanic or African-American voters. The under-representation of minority voters in the Dallas-Ft. Worth region under the state's proposed 2011 plan (C185) is stark given that the area lost 156,742 Anglos between 2000 and 2010, while gaining 600,000 Hispanics and African-Americans during that period, according to the 2010 Census. Under the State's 2011 Plan, Anglos only comprised 41.2% of the Dallas Fort Worth region but controlled 87.5% of the congressional districts in that area.

45. Under the State's proposed 2011 Congressional redistricting plan, some of the Dallas-Fort Worth area's 1.4 million Hispanics were packed into District 30 while the rest of the Hispanic population in that region was fractured among seven different congressional districts. Splits of the Hispanic population occurred between Districts 6 and 30 and in addition, other Hispanic neighborhoods were shifted into heavily Anglo Districts 5,

24, 26, 32 and 33; and African-American voters in the Dallas-Fort Worth region were fractured among Districts 33, 12, and 26. To effect this disenfranchisement and dilution of minority voters, the State's 2011 Congressional redistricting plan twisted electoral boundaries into incoherent and bizarre configurations.

46. The State's 2011 Congressional redistricting plan (C185) did not increase the number of effective Hispanic opportunity districts in South Texas. The previous map (C100) contained six effective Hispanic opportunity districts in the South Texas-border region: 15th - Hinojosa; 16th - Reyes; 20th - Gonzales; 23th - Canseco; 27th - Farenthold; 28th - Cuellar. Under the State's 2011 proposed Map (C185), District 27 was converted to a Coastal Bend and rural district that is controlled by Anglo voters; and District 23's Latino voting strength was diluted in much the same fashion as found unconstitutional by the Supreme Court in *LULAC v. Perry*: District 23 in Plan C185 was transformed from an effective Hispanic opportunity district to an Anglo-controlled district by including high turnout Anglo precincts into the district. District 35 in Plan C185 was purportedly created as an effective Hispanic opportunity district to offset the loss of District 23.

47. The State's 2011 Congressional redistricting plan (C185) showed utter disregard for communities of interest in the South Texas region. In San Antonio and El Paso, radically altered congressional district lines shifted the fast-growing Hispanic population into new districts. These shifts severed Latino voters from their existing elected representatives of choice and dispersed minority

populations across new districts. In San Antonio, minority populations were split across Districts 20, 29, and 35. In El Paso, the minority population was split along the District 23 line.

48. The State's proposed 2011 Congressional redistricting plan (C185) also did not fairly reflect the Hispanic population growth in Harris County. Between 2000 and 2010, Harris County lost 82,000 Anglos, gained 552,000 Hispanics, and added over 134,000 African-Americans. Despite this minority population growth and Anglo population loss, the State's 2011 Congressional redistricting plan fractured the minority community and failed to afford them with any new opportunities to effectively participate in the political process. In addition to District 29, the State's Plan in the Harris County area significantly altered other congressional district lines, splitting Hispanic communities across Districts 7, 9, and 18.

49. The State's proposed 2011 Congressional redistricting plan (C185) effected egregious district splits in Travis County also. Under the State's Plan (Cl85), Travis County was divided into five districts—Districts 10, 17, 21, 25, and 35—none of which contained a majority of Travis County residents. District 10 remained dominated by suburban Harris County voters under Plan C185, and included part of the African-American community in Northeast Austin. District 17 submerged a majority-minority portion of Travis County into a Waco-based congressional district. District 21 entered Travis County from the south, pulling the Capitol and University of Texas into a district controlled by suburban Bexar

County. And District 25 now stretches 200 miles, capturing part of Travis County into a congressional district that stretched so far north that it included severalprecincts in Tarrant County.

50. In addition to diluting the voting strength of Travis County voters and the coalition of minority and Anglo voters who had elected their preferred candidate of choice to Congress under Plan C100 in District 25 (Rep. Doggett), the State's proposed 2011 Congressional redistricting plan (Cl85) also disregarded local precincts in the area. For example, Travis County Commissioner's Precinct one, which contains most of the County's African-American population, was split among four of the congressional districts under Plan C185.

51. The State's proposed 2011 Congressional redistricting plan (C185) also split all four rural counties immediately east and southeast of Austin, and split Hays County three ways.

The Court-Ordered Interim Plan (C235)

52. Because the State's proposed 2011 Congressional plan had not received Section 5 preclearance, on February 28, 2012, this three-judge Court ordered into effect an interim redistricting plan (Plan C235). In doing so, the Court stated that the interim plan was "a result of preliminary determinations regarding the merits of the Section 2 and constitutional claims presented in this case, and application of the 'not insubstantial' standard for the Section 5 claims, as required by the Supreme Court's decision in *Perry v. Perez*." (Dkt. #681).

53. This Court's March 19, 2012 Memorandum Opinion (Dkt. #691) made clear that the court-ordered interim plan was not a final ruling and the plan was imposed on a preliminary basis. The Court stated:

> "Both the § 2 and Fourteenth Amendment claims presented in this case involve difficult and unsettled legal issues as well as numerous factual disputes. It is especially difficult to determine whether a claim has a likelihood of success when the law is unsettled, as many areas of § 2 law are. Further, both the trial of these complex issues and the Court's analysis have been necessarily expedited and curtailed, rendering such a standard even more difficult to apply. The Court has attempted to apply the standards set forth in *Perry v. Perez*, but emphasizes that it has been able to make only preliminary conclusions that may be revised upon full analysis."

(Dkt. #691 at 1-2).

54. The court-approved interim plan (C235) was "a compromise plan" originally offered to the Court as Plan C226 by the Latino Redistricting Task Force plaintiffs, and the Canseco and Cuellar Intervenors. The State of Texas consented to this Court's adoption of that Plan. This Court made technical corrections to Plan C226, noting that the Texas Legislative Council had identified "what appear to be inadvertent intrusions of congressional districts into six different counties. These intrusions consist of either one or at most several census blocks and all contain either no people or very few people." (Dkt. #691 at 29-30).

55. The interim plan (Plan C235) was implemented in the 2012 elections. Those election results can be used to assess the interim plan and, along with other evidence, inform this Court's decision with respect to whether the interim plan meets the requirements of federal law (Section 2 of the Voting Rights Act) and the United States Constitution.

The Texas Legislature's Redistricting Process Used in the 2013 Special Session Was Infected With Intentional Discrimination

56. On May 27, 2013, Governor Perry announced a special session in which the legislature would consider adopting and enacted the Court's interim plans. The Governor's call limited the special session to adoption of the interim plans "as is" and thus did not contemplate amendments or changes to the interim plans that would address constitutional or statutory flaws in the interim plans.

57. The Legislature followed the Governor's instructions precisely, not allowing a single change of any type in the interim congressional plan. Numerous alternative plans repair all or some of the violations in the interim plan and were brought to the attention of the Texas Legislature in the special session. Each one of these alternatives – even those calling for very minor technical changes – was rejected. Moreover, at field hearings held by the Legislature, hundreds of Texas citizens testified *against* adoption of the interim plan and made specific requests for changes that would have repaired flaws and violations in those plans. The testimony of all witnesses calling for changes – large or small – was rejected without

serious consideration or deliberation, demonstrating that those hearings were a sham.

58. During the special session, advocacy groups and elected officials representing minority communities pointed out to the Texas Legislative leaders the statutory and constitutional flaws still present in Plan C235, and urged that these flaws be corrected.

59. On June 1, the Texas legislature enacted Plan C235, the interim Congressional plan, without change. The enacted plan failed to correct the Voting Rights Act and constitutional flaws in the plan.

60. The Texas Legislature's failure to create a new Latino opportunity district in the Dallas-Fort Worth region is a remnant and perpetuation of the state's intent to discriminate against and dilute the voting strength of Latino voters that persists in the 2013 enacted Congressional plan.

61. The Texas Legislature's failure to remedy the intentional cracking of a cohesive community of color in the congressional plan in the Austin area is a remnant and perpetuation of the state's intent to discriminate against voters of color that persists in the 2013 enacted Congressional plan.

62. The Texas Legislature's failure to remedy the intentional carving apart of CD 30, including removal of economic engines and historically active communities important to voters in the district, is a remnant and perpetuation of the state's intent to discriminate against

voters of color that persists in the 2013 enacted Congressional plan.

63. The redistricting process used in the special session to adopt Plan C235 was infected with intentional discrimination against racial and language minority persons.

The State's Proposed 2013 Map (C235), Viewed Statewide

64. Under interim Plan C235, minority voters elected their candidate of choice in 12 districts. In eight of these districts Latino voters elected their candidate of choice: District 15 - Hinojosa, District 16 - O'Rourke, District 20 - Castro, District 23 - Gallego, District 28 - Cuellar, District 29 - G. Green, District 3 - Vela and District 35 - Doggett. In four of these districts, African-American voters elected their candidate of choice: District 9 - A. Green, District 18 - Jackson Lee, District 30 - E. B. Johnson and District 33 - Veasey. There are no other districts under Plan C235 where minority voters can reasonably be expected to elect their candidate of choice to Congress throughout the remainder of the decade.

65. Anglos make up only 45.3 percent of total Texas population and 49.5 percent of the state's voting age population, yet under Plan C235 Anglos easily control 24 out of 36 (over 66 percent) of the state's congressional districts.

66. Latino and African American population growth in Texas over the previous decade accounted for 90 percent of the new Texas population and was responsible for all

four of the new Texas districts being added through allocation. African-Americans make up 11.5 percent of state's voting age population and are sufficiently concentrated and vote cohesively, thereby justifying the retention of four districts (11.1 percent of districts) controlled by African-American voters. Latinos make up 33.6 percent of the state's voting age population and 25.5 percent of the state's citizen voting age population. The eight Latino ability to elect districts under Plan C235 make up only 22.2 percent of the 36-seat delegation. To fairly reflect the state's Latino population growth and the Latino population, at least one additional effective Latino district should be configured. Alternative plans submitted by the Quesada plaintiffs as well by other plaintiffs demonstrate that Texas congressional districts within Plan C235 can be reconfigured to include: four African-American 'ability to elect' districts; nine Latino 'ability to elect' districts; and a Travis County-based cross-over district similar to CD25 in benchmark plan C100.

The State's Proposed 2013 Map (C235), Viewed Regionally

Congressional District 33 In The Interim Plan

67. The 2012 election results showed that, as had been contended by the Quesada plaintiffs from the outset of this case (see Quesada First Amended Complaint (Dkt. #84-1 at ¶s 45, 46 and 56), the African-American population in the Dallas-Fort Worth region was sufficiently large and geographically compact to support the creation of a second African-American ability to elect district in that area (in addition to the pre-existing District (CD 30) held by Congresswoman Eddie Bernice Johnson). In the 2012 elections, African-American voters

in District 33 demonstrated an effective ability to elect their preferred candidate of choice to Congress, African-American Marc Veasey (one of the original plaintiffs in the *Quesada v. Perry* suit). African-American candidate Veasey was the overwhelming candidate of choice of African American majority in both the Democratic primary and runoff elections. In both the primary and runoff, African-American voters comprised a majority of the voters in CD 33 who cast ballots (63% in the primary and 53% in the runoff). Veasey prevailed in the general election, with an estimated 99% of the African American voters casting their ballots for Veasey and an estimated 95% of Hispanics doing so.

68. Although CD 33 performed as an African American ability to elect district in the 2012 election cycle, the minority population in the DFW region remains fractured, containing large pockets of minority population that are stranded in districts dominated by Anglo bloc voters. So while the interim plan did rearrange the DFW region, the State's intentional fracturing of the minority population was not fully addressed and cured. Indeed, it is possible, as the Quesada plaintiffs (and others) have demonstrated in their alternative plans, to create in the DFW region two African-American ability to elect districts and a third district which would provide Latino voters with an effective ability to elect their preferred candidate.

69. The court-ordered interim plan, while an improvement over the state's 2011 enacted plan (C185), still contains several features that dilute minority voting

strength and are remnants or perpetuate the state's intentional discrimination against minority voters.

Fracturing of Nueces County and Congressional District 27 In The 2013 Plan

70. For example, nearly 200,000 Hispanics in Nueces County remain stranded in an Anglo-dominated district, whereas they previously (*i.e.*, pre-2011) were within an effective ability to elect Hispanic district (CD 27) under the benchmark plan (C100). Although Texas replaced CD 27 with CD 34, it exiled the large politically cohesive Hispanic population in Nueces County into districts where they no longer have an effective ability to elect their preferred candidate. The overall effect of this intentional fracturing of the Hispanic population in Nueces County is perpetuated in the court-ordered interim plan and is one reason that the interim plan does not overall fairly reflect Hispanic voting strength in the state.

Congressional District 23 In The State's 2013 Plan

71. As this Court correctly observed in its Memorandum Opinion when it imposed Plan C235, the Plaintiffs' claims that the State of Texas reduced minority voting strength in Congressional District 23 were not insubstantial. Accordingly, this Court altered District 23 in the interim map. To be sure, District 23 in the State's 2013 interim plan (C235) improved the opportunity for Hispanic voters than existed under the State's proposed plan (C185). But the interim plan did not restore District 23 to the same level of Hispanic voting strength as existed in the benchmark plan (C100). While this Court concluded that Congressional District 23 in the interim plan "has

been sufficiently restored to benchmark level," it observed that "the margin of victory has slightly decreased." (Dkt. #691 at 32). Moreover, this Court observed that Texas' own analysis of Congressional District 23 in Plan C235 showed that election performance for Hispanics has been restored to the benchmark level "in 3 out of 10 racially contested exogenous general elections." Thus, in 7 of 10 exogenous general elections, Hispanic voting strength had not been restored to benchmark levels in CD 23. Furthermore, the voters in Congressional District 23 under the benchmark map (C100) were the victims of intentional discrimination and the full remedy for that discrimination is to put them back into the district that would have existed but for the State's discrimination, and the 2013 plan (C285) does not do that.

72. This Court did not decide the intent claims and expressly noted that its interim plan did not address these claims with respect to District 23 or other districts. Because Congressional District 23 was purposefully diluted by the State in 2011 and the interim plan only partially restores and fails to fully remedy that intentional discrimination and dilution, Congressional District 23 as drawn in the 2013 plan should be changed to restore Hispanic voting strength and cure Texas' purposeful discrimination against Hispanic voters.

Congressional District 25 In The State's 2013 Plan

73. In Travis County, the State of Texas purposefully dismantled crossover District 25 in its 2011 plan (C185). Plan C185 contained egregious district splits in Travis County. Under the State's Plan, Travis County is divided into five districts—Districts 10, 17, 21, 25, and 35—none

of which contains a majority of Travis County residents. Minority voters were treated like 'spare parts', and many were stranded in districts controlled by Anglo voters, thereby diluting the voting strength of Travis County voters and the coalition of minority and Anglo voters who had elected their preferred candidate of choice to Congress (Rep. Doggett). The interim plan perpetuates this fracturing and fails to remedy the purposeful destruction of CD 25. While the interim plan does contain a new majority Hispanic district that runs from Travis County to Bexar County, alternative configurations and plans are available which restore the coalition of minority and Anglo voters in Travis County and create a new Hispanic opportunity district in the I-35 corridor south and east of Austin down to San Antonio.

Count I

74. Plaintiffs re-allege the facts set forth in paragraphs 1 through 73, above.

75. The 2011 Congressional redistricting plan violates Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973. That plan results in a denial or abridgement of the right to vote of individual plaintiffs on account of their race, color, or ethnicity, by having the effect of canceling out or minimizing their individual voting strength as minorities in Texas. The Congressional redistricting plan passed by the Texas Legislature in 2011 did not afford individual plaintiffs an equal opportunity to participate effectively in the political process and to elect representatives of their choice, and denies individual plaintiffs the right to vote in elections without

discrimination of race, color, or previous condition of servitude in violation of 42 U.S.C. §1973.

Count 2

76. Plaintiffs re-allege the facts set forth in paragraphs 1 through 73, above.

77. The interim plan (C235) violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, in that, under the totality of the circumstances, Plaintiffs and minority voters are denied an equal opportunity to participate effectively in the political process and to elect candidates of their choice to the U.S. House of Representatives. The State's Congressional Plan also violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it fails to cure features of Texas' enacted plan (C185) that intentionally discriminated against minority voters.

Count 3

78. Plaintiffs re-allege the facts set forth in paragraphs 1 through 73, above.

79. The 2011 Congressional redistricting plan adopted by the Texas Legislature was developed in such a way and with the intent to disadvantage African-American and other minority voters, including Plaintiffs herein. That intentional discrimination is a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, the Fifteenth Amendment of the United States Constitution, and 42 U.S.C. § 1983.

Count 4

80. Plaintiffs re-allege the facts set forth in paragraphs 1 through 73, above.

81. The interim plan (C235) violates the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment to the United States Constitution because it perpetuates the intentional fracturing of politically cohesive minority voters and the intentional dilution of minority voting strength that characterized the state's 2011 enacted plan (Cl85). Plan C235 discriminates against African-American and Hispanic persons by denying Plaintiffs and minority voters an equal opportunity to participate in the political process and to elect candidates of their choice to the U.S. House of Representatives.

Count 5

82. Plaintiffs re-allege the facts set forth in paragraphs 1 through 73, above.

83. The interim plan (C235) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because the State of Texas has adopted a plan that intentionally allows Anglo voters to dominate certain districts, but rejects the creation of districts in which black or Latino voters would dominate districts unless those districts cross a numerical population threshold of 50%. In some instances, for example, the State of Texas has regarded a minority district as protected under the Voting Rights Act even if none of the racial or language minority groups within it does not cross the 50% threshold, while at the same time

rejecting the creation of additional black or Latino districts because they do not exceed the 50% population threshold. This differential treatment of voters violates the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment to the United States Constitution.

V. Prayers for Relief

WHEREFORE, Plaintiffs respectfully pray that this Court:

1. Maintain jurisdiction over this action;

2. Issue a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rules of Civil Procedure Rule 57, declaring that both the 2011 Congressional redistricting plan and the State of Texas' adoption of the congressional plan in 2013 (C235) was undertaken with an intent to discriminate against racial and language minorities in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, and in violation of the Equal Protection Clause of the Fourteenth and Fifteenth Amendment;

3. Issue a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rules of Civil Procedure Rule 57, declaring that the congressional redistricting plans adopted by the Texas Legislature in 2011 and in the special session in June 2013 dilute the voting strength of minority voters in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, and in violation of the Equal Protection Clause of the Fourteenth and Fifteenth Amendment;

4. Issue preliminary and permanent injunctions enjoining the Defendants, their agents, employees, and those persons acting in concert with them, from enforcing or giving any effect to the proposed congressional district boundaries as enacted by the Texas Legislature in 2011 and 2013, including enjoining Defendants from conducting any future elections for the U.S. House of Representatives based on the state's 2013 congressional redistricting Plan;

5. Grant relief pursuant to Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c) based on findings that State of Texas continues to engage in acts of intentional voting discrimination, including the State of Texas's adoption in 2011 and 2013 of Congressional redistricting;

6. Retain jurisdiction for such period as it may deem appropriate and during such period require that Defendants and the State of Texas not enforce any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time this proceeding was commenced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973b(f)(2) of this title;

6. Make all further orders as are just, necessary, and proper to ensure complete fulfillment of this Court's declaratory and injunctive orders in this case;

7. Issue an order requiring Defendants to pay Plaintiffs' costs, expenses and reasonable attorneys' fees incurred in the prosecution of this action, as authorized by the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 and 42 U.S.C. 1973-1(e); and

8. Grant such other and further relief as it deems proper and just.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, *et al.*,	)	
	)	
Plaintiffs,	)	**CIVIL ACTION NO.**
	)	**SA-11-CA-360-OLG-**
	)	**JES-XR**
	)	**[Lead case]**
v.	)	
	)	
STATE OF TEXAS, *et al.*,	)	
	)	
Defendants.	)	
	)	
	)	
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC),	)	**CIVIL ACTION NO.**
	)	**SA-11-CA-361-OLG-**
	)	**JES-XR**
	)	**[Consolidated case]**
	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
STATE OF TEXAS, et al.,	)	
	)	
Defendants.	)	
	)	

TEXAS LATINO REDISTRICTING TASK FORCE, et al.,	)	**CIVIL ACTION NO. SA-11-CV-490-OLG-JES-XR**
Plaintiffs,	)	**[Consolidated case]**
v.	)	
RICK PERRY,	)	
Defendant.	)	
MARAGARITA V. QUESADA, et al.,	)	**CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR**
Plaintiffs,	)	**[Consolidated case]**
v.	)	
RICK PERRY, *et al.,*	)	
Defendants.	)	
JOHN T. MORRIS,	)	**CIVLACTION NO. SA-11-CA-615-OLG-JES-XR**
Plaintiff,	)	**[Consolidated case]**
v.	)	

STATE OF TEXAS, et al.,	)	
Defendants.	)	
	)	
EDDIE RODRIGUEZ, et al.	)	**CIVIL ACTION NO. SA-11-CA-635-OLG-JES-XR**
Plaintiffs,	)	**[Consolidated case]**
v.	)	
RICK PERRY, et al.,	)	
Defendants.	)	

THIRD AMENDED COMPLAINT OF PLAINTIFF-INTERVENORS TEXAS STATE CONFERENCE OF NAACP BRANCHES, *ET AL.*

1. This is an action to enforce NAACP Plaintiff-Intervenors' rights under the Fourteenth Amendment and Fifteenth Amendment to the United States Constitution and under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 et seq. NAACP Plaintiff-Intervenors, an association and individual registered voters, bring this action requesting declaratory and injunctive relief against the State of Texas to challenge both the 2011 redistricting plans for the Texas Congressional districts and the Texas State House districts and the 2013 plans for the same

bodies. Both of the 2011 and 2013 redistricting plans dilute the voting strength of African-American and Latino voters because, under the totality of circumstances, African-American and Latino voters do not have an equal opportunity to elect candidates of their choice to the United States Congress or the Texas House of Representatives. The 2011 redistricting plans were also heavily infected with an intent to discriminate, on the basis of race and ethnicity, against African-American and Latino voters, in violation of both the Voting Rights Act and the Fourteenth Amendment to the United States Constitution. The 2013-enacted plans retain many of the constitutional violations that were present in the 2011 redistricting plans. Although Texas appears to no longer desire to implement the 2011 plans, without a ruling from this Court on the 2011 plans, Texas would be free to continue its racially-discriminatory behavior in the future. Furthermore, absent corrective action from this Court, the 2013 redistricting plans will continue to dilute the voting strength of Texas' African American and Latino citizens and deny them fair representation in these governing bodies. NAACP Plaintiff-Intervenors seek the implementation of Congressional and State House redistricting plans that will not dilute the voting strength of African-American voters in Texas. NAACP Plaintiff-Intervenors also seek costs and attorneys' fees.

I. JURISDICTION

2. Plaintiff-Intervenor's complaint arises under the United States Constitution and federal statutes. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 42 U.S.C. § 1988.

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

4. Plaintiff-Intervenors seek declaratory and injunctive relief pursuant to 28 U.S.C. § 2201 and 2202.

II. PARTIES

5. Plaintiff the Texas State Conference of NAACP Branches is an association of local chapters of the NAACP. It shares the mission of the national NAACP: to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination. The Texas State Conference has previously participated in redistricting litigation in state and federal courts at all levels.

6. Plaintiff Howard Jefferson resides at 4402 Nenana Drive, Houston TX, 77035. A resident of Harris County, he is a member of the Texas State Conference of NAACP Branches and is a registered voter. He lived in State House District 146 in the 2001 state house redistricting plan, in State House District 146 in the 2011 plan, in State House District 146 in the court-ordered interim house plan in use for the 2012 elections, and remains in State House District 146 in the Texas' newly enacted state house redistricting plan.

7. Plaintiff Juanita Wallace resides at 1409 S. Lamar Street, Loft 341, Dallas TX, 75215. A resident of Dallas County, she is the President of the Dallas Branch of the NAACP and is a registered voter. She lives in current Congressional District 30. She lived in State House District 100 in the 2001 state house redistricting plan, in

State House District 100 in the 2011 plan, in State House District 100 in the court-ordered interim house plan in use for the 2012 elections, and remains in State House District 100 in the Texas' newly enacted state house redistricting plan.

8. Plaintiff Rev. Bill Lawson resides at 4042 Glen Code Drive, Houston TX, 77021. A resident of Harris County, he is a member of the NAACP and a registered voter. He is Pastor Emeritus of Wheeler Avenue Baptist Church, and both a long-time civil rights leader and an advocate for the indigent and homeless in Houston. He lives in current Congressional District 18. He lived in State House District 146 in the 2001 state house redistricting plan, in State House District 147 in the 2011 plan, in State House District 147 in the court-ordered interim state house plan in use for the 2012 elections, and remains in State House District 14 in the Texas' newly enacted state house redistricting plan.

9. Defendant the State of Texas is a political subdivision covered under the provisions of the Voting Rights Act and responsible for the actions of its officials with regard to state-wide redistricting.

10. Defendant Rick Perry is the duly elected and acting Governor of the State of Texas. Under Article IV, Section 1, of the Texas Constitution, he is the chief executive officer of the Defendant State of Texas. He is sued in his official capacity.

11. Defendant David Dewhurst is duly elected and acting Lieutenant Governor of Texas. Under Article IV,

Section 16, of the Texas Constitution he is the President of the Texas Senate. He is sued in his official capacity.

12. Defendant Joe Strauss is the duly elected and acting Speaker of the Texas House of Representatives and is the presiding officer over the Texas House of Representatives. He is sued in his official capacity.

13. Defendant Hope Andrade is the duly appointed and acting Secretary State of the State of Texas. She is sued in her official capacity.

III. FACTS

14. The Texas State Conference of NAACP Branches is a non-profit, non-partisan membership organization and has previously been involved in redistricting cases at all levels. The State Conference, its branches and its members have also presented testimony to legislative bodies on various state and local election schemes and/or redistricting plans

15. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, applies nationwide and prohibits voting practices and procedures that result in the denial or abridgement of the right of any citizen to vote on account of race, color, or membership in a language minority group. Section 2 is a permanent provision of the federal Voting Rights Act.

16. After the last decennial census, the Texas Congressional apportionment increased from 32 representatives to 36 representatives, due to an overall population increase of 20.6% (more than twice the average rate of growth nationally). Approximately 89% of the

population growth in Texas in the past decade—growth that resulted in our State's right to 4 additional Congressional representatives—is a result of minority population growth. Both Latino and African-American growth eclipsed Anglo growth in both percentage and raw numbers—Latino growth represented 65% of the state's population growth, the African-American population grew 22%, and the Anglo population grew just 4.2%. Texas is now a majority-minority state—only 45% of the state's total population is Anglo.

17. Proportionally, voters of color in Texas are underrepresented in the U.S. House of Representatives, in both the 2011 and the 2013 plans.

18. During the 2011 redistricting process, the Texas State Conference of NAACP Branches submitted to the Texas Legislature a plan that created a new African-American opportunity seat and a new Latino opportunity seat in the Dallas-Fort Worth area, but the request to create this district was denied. The population growth in the Dallas-Fort Worth area amply justified the creation of two new Congressional minority opportunity districts in the region. The 2011 plan did not create any additional minority opportunity districts in the region. The 2013 plan, while incorporating the court-added African-American opportunity district, Congressional District 33, still deprives Latino voters of an opportunity to elect the candidate of their choice in an additional district in the region. As it is, there are no Latino members of Congress representing the Dallas-Fort Worth Metroplex.

19. As drawn in the congressional plan passed by the Texas Legislature, congressional districts in Harris, Fort Bend, Dallas, Tarrant, Travis, Bexar, Hays and Comal Counties all dilute the voting strength of African-American and Latino voters.

20. In the congressional plan passed by the Texas Legislature in 2011, Congressional Districts 9, 18 and 30 were drawn in a way that undermines the ability of African-Americans to effectively participate in the political process in those areas, and intentionally discriminates against voters in those districts. The congressional plan has similar impact on Latinos in those districts who have acted in coalition with African-Americans to further the interests of both communities. The 2013 congressional plan still does not correct all of the detrimental and purposefully discriminatory changes to Congressional District 30—including removal of important economic engines and historical communities—that were present in the 2011 plan.

21. The 2011 Congressional plans unnecessarily split communities of interest, removed important economic engines from the existing Congressional African-American and Latino districts, and were purposefully designed to undermine or frustrate effective and long term voter coalitions in the area.

22. African Americans and Latinos are currently underrepresented in the Texas House of Representatives. In the 2011 redistricting process, the Texas Legislative Black Caucus tendered to the state legislature a plan that provided 4 additional African-American opportunity

districts in the Texas House of Representatives. The new districts created by the Legislative Black Caucus were State House District 26 in Fort Bend and Harris County, State House District 54 in Bell County, State House District 107 in Dallas County, and State House District 114 in Tarrant County.

23. The result of the plans passed by the Texas Legislature in 2011 was that one major political party is the party of minorities and the other major political party is a party of whites.

24. Elections in Texas continue to be racially polarized.

25. African-Americans in Texas generally vote as a group and are politically cohesive.

26. Latinos in Texas vote as a group and are politically cohesive.

27. Latinos and African-Americans in Texas vote as a group and are politically cohesive. Latinos and African-Americans in Congressional District 30, Congressional District 9 and Congressional District 18 vote as a group and are politically cohesive in ensuring the continued character of the districts. Latinos and African-Americans in Tarrant County vote as a group and are politically cohesive. Latinos and African-Americans in Travis, Hays and Bastrop counties vote as a group and are politically cohesive.

28. Anglos in Texas generally vote as a group, are politically cohesive and vote sufficiently as a block to

defeat the preferred candidate of Latino and African-American voters absent fair and equitable majority-minority single member districts. This has been documented by federal and state courts, the United States Commission on Civil Rights and by the United States Congress.

29. The House Committee on Redistricting held a public hearing on June 2, 2011, and the Senate Select Committee on Redistricting held a public hearing on June 3, 2011, both on the state's proposed Congressional redistricting plan. During the approximately 7 hours of testimony for each meeting, every single person except one testified against the proposed Congressional plan. The Texas Legislature passed it despite this opposition and concern for minority voting rights.

30. During the 2011 legislative process, the Texas Legislature had before it plans for the Congressional, State House and State Senate districts that did not dilute the voting strength of African-American and Latino voters, and the legislature rejected those plans for plans that did not afford minority voters an equal opportunity to elect candidates of their choice.

31. Numerous plaintiff groups filed suit in the summer of 2011, challenging the 2011 enacted Congressional, State House, and State Senate plans as violating the Equal Protection Clause of the 14th Amendment and Section 2 of the Voting Rights Act.

32. Because Texas was, during 2011, a covered jurisdiction under Section 5 of the Voting Rights Act of

1965, it was required to obtain federal preclearance before implementing its enacted redistricting plans. Because the state failed to do so in a timely fashion, this three-judge panel in the United States District Court for the Western District of Texas was forced to craft an interim plan to govern the 2012 elections.

33. This Court ordered into effect Congressional Plan C235 and State House Plan H309 on February 28, 2012, based on "preliminary determinations regarding the merits of the Section 2 and constitutional claims presented in this case." (Doc. No. 681). The Court noted, however, that its "preliminary conclusions" "may be revised upon full analysis." (Doc. No. 681).

34. Moreover, following the United States Supreme Court ruling in *Perry v. Perez*, this Court was instructed to pay significant deference to the state's 2011 enacted plans—plans that were deeply infected by an intent to discriminate against and dilute the voting strength of the state's exploding minority population.

35. Months after this Court had issued its order on the interim plans to govern the 2012 elections, a three-judge panel in the United States District Court for the District of Columbia ruled in the Section 5 case before it, where the State of Texas sought preclearance for its 2011 enacted redistricting plans.

36. The D.C. Court made substantial findings regarding the intentional discrimination that infected the process by which the state drew its 2011 redistricting

plans, and the discriminatory effect that resulted in the Congressional and State House plans.

37. With regards to the Congressional plan, the D.C. Court noted that the Department of Justice and Intervenors (many of whom are Plaintiffs in the instant action) presented more evidence of intentional discrimination than the court had room to discuss. *Texas v. United States*, 887 F. Supp. 2d 133, 162 n. 32 (D.D.C. 2012). Specifically, the Court found that the way in which the State had carved apart the Congressional districts being represented by AfricanAmerican members of Congress could be explained only by an intent to discriminate against minority voters in the districts. *Id.* at 160-61.

38. The D.C. Court also cited the failure to draw a new Latino opportunity district in the Dallas-Fort Worth area as evidence of the Texas legislature's deep-seated intent to dilute the voting strength of Latino voters. *Id.* at 162, n. 32.

39. The D.C. Court found that the State House plan would have a demonstrably negative effect on the ability of minority voters to elect the candidates of their choice, so it did not formally address allegations of intentional discrimination in the State House plan. *Id.* at 177. It did, however, note that ample evidence existed and was presented to the court that would support a conclusion that discriminatory intent likewise drove the drawing and enactment of the State House plan. *Id.* at 178.

40. The election results in 2012, in elections under this Court's ordered interim plans, demonstrate that not every statutory and constitutional flaw identified in the 2011 redistricting plans was corrected.

41. While the interim plan did make improvements, including the construction of Congressional District 33 in the Dallas-Fort Worth area, minority voters in that area still have not had the vote dilution they have suffered, nor the harm caused by being subject to unconstitutional intentional discrimination, fully remedied.

42. As urged by the NAACP from the inception of this litigation, the minority population growth in the Dallas-Fort Worth Metroplex was more than sufficient to support an additional, reasonably-compact district in which African-American voters would have an opportunity to elect the candidate of their choice. In the 2012 elections, African-American voters in the region were able to elect their candidate of choice in two districts—CD 30 and new CD33. African-American Congressman Marc Veasey, elected from CD 33 in 2012, received the overwhelming support of black and Latino voters in his November election.

43. There is sufficient Latino population in the Dallas-Fort Worth metroplex to construct a reasonably-compact district in which Latino voters have an opportunity to elect their candidate of choice. This district can be drawn while still maintaining the ability of black voters to elect their candidates of choice in CD 30 and CD 33.

44. The Court-ordered interim plan also did not correct all of the damage done to CD 30 by the Texas legislature in 2011.

45. The Court-ordered interim plan did not reunite the intentionally-cracked African-American and Latino voters in historic East Austin—voters in former CD 25.

46. The interim plan ordered into place for elections to the Texas House of Representatives, like the Congressional interim plan, made some important corrections to statutory and constitutional violations in the 2011 enacted plans, but does not fully remedy those flaws.

47. H309 did remedy the intentional destruction of HD 149, a coalition district in Harris County in which Asian-Americans, African-Americans and Latinos voted cohesively to elect their candidate of choice.

48. H309 did not create any new districts in which African-American voters would have an opportunity to elect their candidate of choice.

49. On May 27, 2013, Governor Perry announced a special session in which the legislature would consider adopting and enacting the Court's interim plans. The Governor's call limited the special session to adoption of the interim plans and thus did not contemplate amendments or changes to the interim plans that would address constitutional or statutory flaws in the interim plans.

50. During the special session, advocacy groups and elected officials representing minority communities pointed out the statutory and constitutional flaws still present in the Court's interim plan, and urged that these flaws needed to be corrected.

51. On June 1 and 3, the legislature enacted the C235, the interim Congressional plan, without change, and it enacted H309, the interim House plan (then H358), with only minor changes, none of which corrected the Voting Rights Act and constitutional flaws in the plan.

52. The challenges brought by the NAACP to the 2011 Congressional and State House Plans are not moot because, absent a ruling from this Court, Texas is free to continue its racially discriminatory redistricting practices. Moreover, many of the intentionally discriminatory elements in the 2011 plans are still present in the 2013 plans.

53. The failure to create a new Latino opportunity district in the Dallas-Fort Worth region is a remnant and perpetuation of the state's intent to discriminate against and dilute the voting strength of Latino voters that persists in the 2013 enacted Congressional plan.

54. The failure to remedy the intentional cracking of a cohesive community of color in the congressional plan in the Austin area is a remnant and perpetuation of the state's intent to discriminate against voters of color that persists in the 2013 enacted Congressional plan.

55. The failure to remedy the intentional carving apart of CD 30, including removal of economic engines and historically-active communities important to voters in the district, is a remnant and perpetuation of the state's intent to discriminate against voters of color that persists in the 2013 enacted Congressional plan.

56. The failure to create any new African-American opportunity districts is a remnant and perpetuation of the state's intent to discriminate against and dilute the voting strength of African-American voters that persists in the 2013 enacted State House plan.

CAUSES OF ACTION

COUNT I

57. The allegations contained in paragraphs 1-56 are alleged as if fully set forth herein.

58. The 2011 Congressional and State House redistricting plans violated Section 2 of the Voting Rights Act, as amended, 42 U.S. § 1973. Those plans result in a denial or abridgement of the right to vote of individual plaintiffs and organizational plaintiff's members on account of their race, color, or ethnicity, by having the effect of canceling out or minimizing their individual voting strength as minorities in Texas. The redistricting plans passed by the Texas Legislature in 2011 did not afford individual plaintiffs and organizational plaintiff's members an equal opportunity to participate in the political process and to elect representatives of their choice, and deny individual plaintiffs and organizational plaintiff's members the right to vote in elections without

discrimination of race, color, or previous condition of servitude in violation of 42 u.s.c. § 1973.

COUNT II

59. The allegations contained in paragraphs 1-58 are alleged as if fully set forth herein.

60. The 2013 Congressional and State House redistricting plans violate Section 2 of the Voting Rights Act, as amended, 42 U.S. § 1973. These plans result in a denial or abridgement of the right to vote of individual plaintiffs and organizational plaintiff's members on account of their race, color, or ethnicity, by having the effect of canceling out or minimizing their individual voting strength as minorities in Texas. The redistricting plans passed by the Texas Legislature on June 1 and 3, 2013, do not afford individual plaintiffs and organizational plaintiff's members an equal opportunity to participate in the political process and to elect representatives of their choice, and deny individual plaintiffs and organizational plaintiff's members the right to vote in elections without discrimination of race, color, or previous condition of servitude in violation of 42 U.S.C. § 1973.

COUNT III

61. The allegations contained in paragraphs 1-60 are alleged as if fully set forth herein.

62. The 2011 redistricting plans adopted by the Texas Legislature were developed with the intent to disadvantage African-American and other minority voters. That intentional discrimination is in violation of the Equal Protection Clause of the Fourteenth

Amendment of the United States Constitution, the Fifteenth Amendment of the United States Constitution, and 42 U.S.C. § 1983.

COUNT IV

63. The allegations contained in paragraphs 1-62 are alleged as if fully set forth herein.

64. The 2013 redistricting plans adopted by the Texas Legislature were developed in such a way and with the intent persisting from the 2011 plans to disadvantage African-American and other minority voters. Specifically, the 2013 redistricting plans retain elements of the 2011 redistricting plans that were undeniably motivated by unconstitutional desires to minimize and exclude the political voice of voters of color in the state. This intentional discrimination is in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, the Fifteenth Amendment of the United States Constitution, and 42 U.S.C. § 1983.

COUNT V

65. The allegations contained in paragraphs 1-64 are alleged as if fully set forth herein.

66. The 2011 and 2013 Congressional and State House redistricting plans adopted by the Texas Legislature are so rife with an intent to discriminate against minority voters that Plaintiffs and all minority voters in Texas are entitled to equitable relief under Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973.

BASIS FOR EQUITABLE RELIEF

67. NAACP Plaintiff-Intervenors have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for declaratory judgment and injunctive relief is their only means of securing adequate redress from all of the Defendants' unlawful practices.

68. NAACP Plaintiff-Intervenors will continue to suffer irreparable injury from all of the Defendants' intentional acts, policies, and practices set forth herein unless enjoined by this Court.

ATTORNEYS' FEES

69. In accordance with 42 U.S.C. Section 1973-l(e) and 1988, NAACP Plaintiffs are entitled to recover reasonable attorney's fees, expenses and costs.

PRAYER

NAACP Plaintiff-Intervenors respectfully pray that this Court enter Judgment granting:

A. A declaratory judgment that State Defendants' actions violate the rights of Plaintiffs as protected by Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 et seq., and the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983; and

B. Preliminary and permanent injunctive relief requiring State Defendants, their successors in office, agents, employees, attorneys, and those persons acting in concert with them and/or at their discretion—to develop redistricting plans that do not dilute African American

and minority voting strength for the Texas House of Representatives and the United States House of Representatives, and enjoining and forbidding the use of the newly-enacted congressional and State House redistricting plans; and

C. An order requiring the State of Texas to submit to this Court for preclearance, under Section 3(c) of the Voting Rights Act, any change to any voting practice or procedure, including but not limited to any new redistricting plan, for a period not less than 10 years; and

D. If need be, adopt an interim electoral plan for the 2014 elections for United States Congress and Texas House of Representatives that remedy these statutory and constitutional flaws; and

E. An order of this Court retaining jurisdiction over this matter until all Defendants have complied with all orders and mandates of this Court; and

F. An order requiring Defendants to pay all costs including reasonable attorneys' fees, and

G. Such other and further relief as the Court may deem just and proper.

Dated: September 18, 2013.

Respectfully Submitted,

/s/ Allison J. Riggs
Allison J. Riggs

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, *et al.*,	)	
	)	CIVIL ACTION NO.
Plaintiffs,	)	SA-11-CA-360-OLG-
	)	JES-XR
v.	)	[Lead case]
	)	
STATE OF TEXAS, *et al.*,	)	
	)	
Defendants.	)	
	)	
	)	
MEXICAN AMERICAN	)	CIVIL ACTION NO.
CAUCUS, TEXAS HOUSE	)	SA-11-CA-361-OLG
OF REPRESENTATIVES	)	JES-XR
(MALC),	)	[Consolidated Case]
	)	
Plaintifs,	)	
v.	)	
	)	
STATE OF TEXAS, *et al.*,	)	
	)	
Defendants.	)	
	)	
	)	
TEXAS LATINO	)	CIVIL ACTION NO.
REDISTRICTING TASK	)	SA-11-CV-490-OLG
FORCE, *et al.*,	)	JES-XR
	)	[Consolidated case]
Plaintiffs,	)	

v.	)	
RICK PERRY, *et al.*,	)	
Defendant.	)	
	)	
MARAGARITA V. QUESADA, *et al.*,	)	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR
Plaintiffs,	)	[Consolidated case]
v.	)	
RICK PERRY, *et al.*,	)	
Defendants.	)	
	)	
JOHN T. MORRIS	)	CIVIL ACTION NO. SA-11-CA-615-OLG-JES-XR
Plaintiff,	)	[Consolidated case]
v.	)	
STATE OF TEXAS, *et al.*,	)	
Defendants.	)	
	)	
EDDIE RODRIGUEZ, *et al.*,	)	CIVIL ACTION NO. SA-11-CA-635-OLG-JES-XR
Plaintiffs,	)	

	)	[Consolidated case]
v.	)	
	)	
RICK PERRY, *et al.*,	)	
	)	
Defendants.	)	

SECOND AMENDED COMPLAINT OF PLAINTIFF-INTERVEORS CONGRESSPERSONS EDDIE BERNICE JOHNSON, SHEILA JACKSON LEE AND ALEXANDER GREEN

1. This is an action to enforce Plaintiff-Intervenors' rights under the Fourteenth Amendment to the United States Constitution and under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 et seq. Plaintiff-Intervenors, members of the United States Congress and individual registered voters, bring this action requesting declaratory and injunctive relief against the State of Texas to prevent the implementation of 2013 redistricting plans for the Texas Congressional districts. The recently adopted 2013 Texas Congressional redistricting plans dilute the voting strength of African-American and Latino voters because, under the totality of circumstances, African-American and Latino voters do not have an equal opportunity to elect candidates of their choice to the United States Congress. If implemented, these plans will dilute the voting strength of Texas' African-American and Latino citizens and deny them fair representation in the United States Congress and deprive minority voters and minority representatives of the ability to forge majority coalitions in Congress on issues of importance with like-minded Anglo voters and representatives. Plaintiff-

Intervenors seek the implementation of a Congressional plan that will not dilute the voting strength of African-American voters in Texas. Plaintiff-Intervenors also seek costs and attorneys' fees.

I. JURISDICTION

2. Plaintiff-Intervenors' complaint arises under the United States Constitution and federal statutes. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 1988.

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

4. Plaintiff-Intervenors seek declaratory and injunctive relief pursuant to 28 U.S.C. § 2201 and 2202.

II. PARTIES

5. Plaintiff-Intervenors, the AFRICAN-AMERICAN CONGRESSIONAL INTERVENORS, are MEMBERS of the UNITED STATES CONGRESS and VOTERS. Congresswomen Johnson and Jackson-Lee have participated in previous rounds of redistricting, and Congressman Green participated in 2011. They all are participating now because of their legitimate concerns regarding the newly adopted plan.

6. Congresswoman Eddie Bernice Johnson is an African-American who resides in Dallas, Texas and represents CD 30. She has served in Congress since 1993. Congresswoman Johnson was the first African-American female Chairperson of a Congressional subcommittee. She is a former Chair of the Congressional Black Caucus

and currently a member of the House Transportation and Infrastructure Committee; Aviation, Highways and Transit; and Water Resources and Environment Subcommittees. Congressperson Johnson has worked zealously to represent her district, where she ably represents African-American voters and a coalition of African-American, Latino and other voters.

7. Congresswoman Sheila Jackson-Lee is in her 10th term in the United States Congress. She is a member of the Judiciary and Homeland Security Committees and is the founder and co-chair of the Congressional Children's Caucus. She has been a true advocate for immigration during her tenure in Congress and has worked zealously to represent her district, CD 18, where she ably represents African-American voters and a coalition of African-American, Latino and other voters.

8. Congressman Alexander Green is in his fifth term in Congress. He is a member of the Financial Services Committee, the Sub-Committee on Capital Markets and Government Sponsored Enterprises, and the Subcommittee on Domestic Monetary Policy and Technology. He is a former elected Judge and President of the Houston Branch of the NAACP, and he ably and zealously represents African-American voters and a coalition of African-American, Latino and other voters.

9. Defendant is the State of Texas. The State of Texas is a political subdivision covered under the provisions of the Voting Rights Act and responsible for the actions of its officials with regard to state-wide redistricting.

10. Defendant Rick Perry is the duly elected and acting Governor of the State of Texas. Under Article IV, Section 1, of the Texas Constitution, he is the chief executive officer of the Defendant State of Texas. He is sued in his official capacity.

11. Defendant David Dewhurst is duly elected and acting Lieutenant Governor of Texas. Under Article IV, Section 16, of the Texas Constitution he is the President of the Texas Senate. He is sued in his official capacity.

12. Defendant Joe Strauss is the duly elected and acting Speaker of the Texas House of Representatives and is the presiding officer over the Texas House of Representatives. He is sued in his official capacity.

13. Defendant John Steen is the duly appointed and acting Secretary of State of the State of Texas. He is being sued in his official capacity.

III. FACTS

14. The African-American Congressional Intervenors opposed the interim plans prior to their adoption before the 2012 election. They also opposed the newly adopted plan, which largely mirrors the previously opposed interim plan, when it was adopted in special session of the legislature in June 2013.

15. The newly adopted Congressional Plan corrected some of the problems with the 2011 adopted plan, but numerous concerns were not addressed. The State of Texas has acknowledged that the newly adopted plan corrected alleged problems with the 2011 adopted plan.

16. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, applies nationwide and prohibits voting practices and procedures that result in the denial or abridgment of the right of any citizen to vote on account of race, color, or membership in a language minority group. Section 2 is a permanent provision of the federal Voting Rights Act.

17. The total Texas population is approximately 12% African-American, according to the 2010 federal census. African-Americans comprise at least this percentage of the state's Citizen Voting Age population.

18. After the last decennial census, Texas' congressional delegation was increased from 32 to 36. Currently there are at most 12 districts out of 36 that might be considered minority-ability-to-elect or influence districts. There were 11 out of the previous 32. This indicates a slight decrease in electoral strength under this map. The recent opinion of the D.C. three-judge panel in the case under Section 5 indicated that rough proportionality would indicate that there should be at least 14 ability-to-elect seats while acknowledging that exact proportionality is not required. Because of the treatment of these African-American Congressional Intervenors in the C185 plan adopted in 2011 and the irregularity of the Legislative process that led to the plan's adoption (among other matters) the D.C. panel decided that that plan was adopted as a result of intentional discrimination. Approximately 89% of the population growth in Texas this past decade—growth that resulted in our State's right to 4 additional Congressional representatives—is a result of minority population

growth. Both Latino and African-American growth eclipsed Anglo growth in both percentage and raw numbers—Latino growth represented 65% of the state's population growth, the African-American population grew 22% (14% of the total growth of the State approximately), and the Anglo population grew just 4.2%. Texas is now a majority-minority state—only 45% of the state's total population is Anglo. Under the current configuration, Anglos dominate the outcome in at least two-thirds of the seats under the recently adopted plan.

19. The vast majority of Anglo voters have been placed in Congressional districts where Anglo voters can determine the outcome, but the opposite is true for African-American and Latino voters.

20. Many districts have been drawn with shapes that have the consequence of dividing minority communities and causing minority voters to be placed in districts primarily populated by voters who generally oppose candidates preferred by the majority of African-American or Latino voters in those districts, especially in the Dallas-Fort Worth Metroplex.

21. African-Americans and Latinos combined comprise approximately 39.3 percent of the Texas Citizen Voting Age population and 49.4 percent of the total adult voting age population. These groups are underrepresented in Texas' Congressional Delegation.

22. Several plans were submitted to the Legislature that would create naturally occurring seats in the Dallas-Fort Worth area that would enhance the ability of

African-Americans and Latinos to achieve fair representation while also respecting the integrity of CD 30 as recognized by the three-judge panel in the Section 5 litigation. However, the interim plan was adopted even though it was primarily opposed by minority legislators and minority organizations. The Tarrant and Dallas County configuration in the plan includes 2 African-American ability-to-elect seats but continues an egregious pattern of racial gerrymandering. The African-American and Hispanic populations in the Metroplex increased by over 600,000 persons between 2000 and 2010, while the Anglo population decreased by 156,732 during the same period. CD 30 in the newly adopted plan packs District 30 with what is believed to be the largest percentage of African-American and Hispanic constituents during Congresswoman Johnson's tenure in Congress (85.2%). Congressional Districts 5, 32 and 6 were drawn in order to crack minority voters in the North Texas area. The result of the cracking and packing and the bias afforded Anglo voters in the drafting process has resulted in underrepresentation in the Dallas-Fort Worth area. There are more than 2 million African-American and Latino residents in the Dallas-Fort Worth Metroplex, easily enough to support 3 minority ability-to-elect seats.

23. Anglo voters in Texas and in the Metroplex have more voting power than African-Americans and Latinos in Texas or the Metroplex.

24. As drawn in the newly enacted congressional plan passed by the Texas Legislature, congressional districts in Dallas, Tarrant, Travis, Bexar, Hays and Comal

Counties all dilute the voting strength of African-American voters.

25. CD 30 was drawn in a manner to specifically prevent minorities from obtaining a third ability-to-elect seat. It is easy to configure naturally occurring Congressional Districts that unite instead of divide communities of interest to create such a seat while strengthening CD 30 and CD 33. The three-judge panel in the Section 5 case discussed how the African-American Congressional districts were treated differently. The problem identified in that court opinion continues for CD 30 where many communities of interest, economic engines and development areas were unnecessarily placed in District 32. For example, the Oak Lawn, Turtle Creek, Uptown, Cityplace, Know-Henderson, Lower Greenville and Junius Heights areas were previously in CD 30, which was of near perfect size in C 100 in 2011. In the congressional plan passed by the Texas Legislature in 2011, Congressional Districts 9, 18 and 30 were drawn in a way that undermined the ability of African-Americans to effectively participate in the political process in those areas. The state's proposed plan has similar impact on Latinos in those districts who have acted in coalition with African-Americans to further the interests of both communities. As evidenced by CD 30's configuration, the newly adopted plan splits communities of interest, deletes important areas from existing Congressional districts, and is designed to undermine or frustrate effective and long term coalitions in the area.

26. The newly adopted 2013 Legislative Plan (the Interim Plan previously) corrected many of the problems

raised regarding Congressional District 9 and Congressional District 18. However, it fell far short of correcting the problems in CD 30. This district was drawn in a manner that undermines the ability to provide proper representation in the Metroplex to African-American or Latino voters.

27. When using traditional redistricting principles in drafting a new Congressional Plan minority voters should have the same rights as white voters to naturally occurring districts. The treatment of minority voters in this regard in the Dallas-Fort Worth Metroplex, Travis County, Bexar County, South Texas, Nueces County and other locations shows that the State uses a different standard for its treatment of minority voters and residents compared to white voters and residents in the redistricting process.

28. The method of drafting indicates a possible intent to either prefer white voters over minority voters or to divide political parties according to race or ethnicity.

29. Elections in Texas continue to be racially polarized.

30. African-Americans in Texas generally vote as a group and are politically cohesive.

31. Latinos in Texas vote as a group and are politically cohesive.

32. Latinos and African-Americans in Texas vote as a group and are politically cohesive. Latinos and African-Americans in Congressional District 30, Congressional

District 9 and Congressional District 18 vote as a group and are politically cohesive in ensuring the continued character of the districts. Latinos and African-Americans in Tarrant County vote as a group and are politically cohesive. Latinos and African-Americans in Travis, Hays and Bastrop counties vote as a group and are politically cohesive. Latinos and African-Americans in Nueces County and Bexar County vote as a group and are politically cohesive.

33. Anglos in Texas generally vote as a group, are politically cohesive and vote sufficiently as a block to defeat the preferred candidate of Latino and African-American voters absent fair and equitable majority-minority single-member districts. This has been documented by federal and state courts, the US Commission on Civil Rights and the United States Congress.

34. The Legislature adopted the interim plans despite overwhehning opposition to them. It is clear that the democratic process was of no concern, and the legislative process was viewed as a necessary exercise to adopt already agreed-to plans.

35. During the 2013 legislative process, the Texas Legislature had before it plans for the Congressional districts that did not dilute the voting strength of African-American, Latino and minority voters, and the legislature rejected those plans for plans that did not afford minority voters an equal opportunity to elect candidates of their choice.

36. During the 2011 legislative process, the Texas Legislature had before it plans for the Congressional districts that did not dilute the voting strength of African-American and Latino voters, and the legislature rejected those plans for plans that did not afford minority voters an equal opportunity to elect candidates of their choice.

37. Numerous plaintiff groups filed suit in the summer of 2011, challenging the 2011 enacted Congressional, State House, and State Senate plans as violating the Equal Protection Clause of the 14th Amendment and Section 2 of the Voting Rights Act.

38. Because Texas was, during 2011, a covered jurisdiction under Section 5 of the Voting Rights Act of 1965, it was required to obtain federal preclearance before implementing its enacted redistricting plans. Because the state failed to do so in a timely fashion, this three-judge panel in the United States District Court for the Western District of Texas was forced to craft an interim plan to govern the 2012 elections.

39. This Court ordered into effect Congressional Plan C235 and State House Plan H309 on February 28, 2012, based on "preliminary determinations regarding the merits of the Section 2 and constitutional claims presented in this case." (Doc. No. 681). The Court noted, however, that its "preliminary conclusions" "may be revised upon full analysis." (Doc. No. 681).

40. Moreover, following the United States Supreme Court ruling in *Perry v. Perez*, this Court was instructed to pay significant deference to the state's 2011 enacted

plans—plans that were deeply infected by an intent to discriminate against and dilute the voting strength of the state's exploding minority population.

41. Months after this Court issued its order on the interim plans to govern the 2012 elections, a three-judge panel in the United States District Court for the District of Columbia ruled in the Section 5 case before it, where the State of Texas sought preclearance for its 2011 enacted redistricting plans.

42. The D.C. Court made substantial findings regarding the intentional discrimination that infected the process by which the state drew its 2011 redistricting plans, and the discriminatory effect that resulted in the Congressional and State House plans.

43. With regards to the Congressional plan, the D.C. Court noted that the Department of Justice and Intervenors (many of whom are Plaintiffs in the instant action) presented more evidence of intentional discrimination than the court had room to discuss. Specifically, the Court found that the way in which the State had carved apart the Congressional districts being represented by African-American members of Congress could be explained only by an intent to discriminate against minority voters in the districts.

44. The D.C. Court also cited the failure to draw a new Latino opportunity district in the Dallas-Fort Worth area as evidence of the Texas Legislature's deep-seated intent to dilute the voting strength of Latino voters.

45. That Court also found the destruction of an effective minority crossover district, CD 25, to be motivated by an intent to discriminate against the minority voters in the district.

46. The D.C. Court found that the State House plan would have a demonstrably negative effect on the ability of minority voters to elect the candidates of their choice, so it did not formally address allegations of intentional discrimination in the State House plan. It did, however, note that ample evidence existed and was presented to the court that would support a conclusion that discriminatory intent likewise drove the drawing and enactment of the State House plan.

47. The election results in 2012, in elections under this Court's ordered interim plans, demonstrate that not every statutory and constitutional flaw identified in the 2011 redistricting plans was corrected.

48. While the interim plan did make improvements, including the construction of Congressional District 33 in the Dallas-Fort Worth area, voters in that area still have not had their situation fully remedied.

49. As urged by the NAACP from the inception of this litigation, the minority population growth in the Dallas-Fort Worth Metroplex was more than sufficient to support an additional, reasonably compact district in which African-American voters would have an opportunity to elect the candidate of their choice. In the 2012 elections, African-American voters in the region were able to elect their candidate of choice in two

districts—CD 30 and new CD 33. Congressman Marc Veasey, elected from CD 33 in 2012, received the overwhelming support of black and Latino voters in the November election.

50. There is sufficient Latino population in the Dallas-Fort Worth Metroplex to construct a reasonably compact district in which Latino voters have an opportunity to elect their candidate of choice. This district can be drawn while still maintaining the ability of black voters to elect their candidates of choice in CD 30 and CD 33. The egregious racial gerrymander in the area and the new configuration of CD 30 are obstacles to drawing such a district.

51. The court-ordered interim plan also did not correct all of the damage done to CD 30 by the Texas legislature in 2011.

52. The court-ordered interim plan did not reunite the intentionally-cracked African-American and Latino voters in historic East Austin—voters in former CD 25.

53. The interim plan ordered into place for elections to the Texas House of Representatives, like the Congressional interim plan, made some important corrections to statutory and constitutional violations in the 2011 enacted plans, but does not fully remedy those flaws.

54. On May 27, 2013, Governor Perry announced a special session in which the legislature would consider adopting and enacting the Court's interim plans.

55. During the special session, advocacy groups and elected officials representing minority communities pointed out the statutory and constitutional flaws still present in the Court's interim plan, and urged that these flaws needed to be corrected.

56. On June 1 and 3, the legislature enacted the C235, the interim congressional plan, without change. The interim plan was based on the C185 plan that was seriously infected with discrimination and did not correct various flaws under the United States Constitution or the Voting Rights Act

57. The failure to create a new Latino opportunity district in the Dallas-Fort Worth region is a remnant of the state's intent to discriminate against and dilute the voting strength of Latino voters that persists in the 2013 enacted congressional plan.

58. The failure to draw a naturally occurring district in the Dallas-Fort Worth region that provides the same Constitutional protections as provided to white voters in the area is a remnant of the state's intent to discriminate against and dilute the voting strength of Latino voters in the 2013 enacted Congressional plan.

59. The failure to remedy the intentional cracking of a cohesive community of color in the congressional plan in the Austin area and the carving up of the county (Travis) into six separate Congressional districts are remnants of the state's intent to discriminate against voters of color that persists in the 2013 enacted Congressional plan.

60. The failure to remedy the intentional carving apart of CD 30, including removal of economic engines and historically active communities important to voters in the district, is a remnant of the state's intent to discriminate against voters of color that persists in the 2013 enacted Congressional plan.

61. The State passed a voter identification law in 2011 that was held to discriminate against minority voters in violation of Section 5 of the Voting Rights Act. The decision was made by a bi-partisan three-judge panel sitting in Washington, D.C. However, the case was reversed because of the U.S. Supreme Court's Shelby County decision that made Section 5 no longer viable. However, there was still a Section 5 analysis by a bi-partisan group. The State completely disregarded the decision of the bi-partisan group of judges and implemented the plan, which the panel had declared unnecessarily restrictive. This action again evidences a discriminatory intent towards minority voters or at least a conscious disregard for their rights.

IV. CAUSES OF ACTION

Count I

62. The allegations contained in paragraphs 1-61 are alleged as if fully set forth herein.

63. The newly-enacted Congressional redistricting plan violates Section 2 of the Voting Rights Act, as amended, 42 U.S. § 1973. These plans result in a denial or abridgment of the right to vote of individual plaintiffs and organizational plaintiffs' members on account of their

race, color, or ethnicity, by having the effect of canceling out or minimizing their individual voting strength as minorities in Texas. The redistricting plans passed by the Texas Legislature on June 1 and 3, 2013, do not afford individual plaintiffs an equal opportunity to participate in the political process and to elect representatives of their choice, and they deny individual plaintiffs the right to vote in elections without discrimination of race, color, or previous condition of servitude in violation of 42 U.S.C. § 1973. Each of the individual plaintiffs is denied the opportunity to work with many other Congresspersons who may have constituents of like interests. Congresswoman Johnson is required to represent and vote in a district that was designed to discriminate against minority voters as a result of the unnecessary changes to CD 30 from Cl00 in 2011.

Count II

64. The allegations contained in paragraphs 1-61 are alleged as if fully set forth herein.

65. The congressional redistricting plan adopted by the Texas Legislature was developed in such a way and with the intent of disadvantaging African-American and other minority voters. This intentional discrimination violates the 14th Amendment to the United States Constitution and 42 U.S.C. § 1983.

Count III

66. The allegations contained in paragraphs 1-61 are alleged as if fully set forth herein.

67. The interim plan C235 violates the equal protection clause of the 14th Amendment to the United States Constitution because the State of Texas has adopted a plan that intentionally allows Anglo voters to dominate certain districts, but rejects the creation of districts in which African-American or Latino voters would dominate unless those districts cross a numerical population threshold of 50%. In some instances, for example, the State of Texas has regarded a minority district as protected under the Voting Rights Act even if none of the racial or language minority groups within it does not cross the 50% threshold, while at the same time rejecting the creation of additional African-American or Latino districts because they do not exceed the 50% population threshold. This differential treatment of voters violates the Equal Protection Clause of the Fourteenth Amendment. Further the shapes and configurations of such districts and the design of a map as a whole indicate such a violation.

Count IV

68. The allegations contained in paragraphs 1-61 are alleged as if fully set forth herein.

69. The Congressional redistricting plan adopted by the Texas Legislature is so rife with an intent to discriminate against minority voters that Plaintiffs and all minority voters in Texas are entitled to equitable relief under Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973.

Count V

70. The allegations contained in paragraphs 1-61 are alleged as if fully set forth herein.

71. The Congressional redistricting plan adopted by the Texas Legislature penalized minority voters and is drawn in such a way as to intentionally discriminate and disadvantage them and make them voters of an inferior status. This intentional discrimination is in violation of the 14th and 15th Amendments of the United States Constitution and 42 U.S.C. § 1983.

V. BASIS FOR EQUITABLE RELIEF

72. Plaintiff-Intervenors have no plain, adequate, or complete remedy at law to redress the wrongs alleged herein, and this suit for declaratory judgment and injunctive relief is their only means of securing adequate redress from all of the Defendants' unlawful practices.

73. Plaintiff-Intervenors will continue to suffer irreparable injury from all of the Defendants' intentional acts, policies, and practices set forth herein unless enjoined by this Court.

VI. ATTORNEYS' FEES

74. In accordance with 42 U.S.C. § 1973-l(e) and 1988, Plaintiffs are entitled to recover reasonable attorneys' fees, expenses, and costs.

VII. PRAYER

75. Plaintiff-Intervenors respectfully pray that this Court enter Judgment granting:

A. A declaratory judgment that State Defendants' actions violate the rights of Plaintiffs as protected by Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 et seq., the Fourteenth Amendment to the United States Constitution, and the Fifteenth Amendment to the United States Constitution and 42 U.S.C. § 1983; and

B. Preliminary and permanent injunctive relief requiring State Defendants, their successors in office, agents, employees, attorneys, and those persons acting in concert with them and/or at their discretion – to develop redistricting plans that do not dilute African American and minority voting strength for the United States House of Representatives, and enjoining and forbidding the use of the newly-enacted congressional redistricting plan; and

C. An order requiring the State of Texas to submit to this Court for preclearance, under Section 3(c) of the Voting Rights Act, any change to any voting practice or procedure, including but not limited to any new redistricting plan, for a period not less than 10 years; and

D. If need be, adopt an interim electoral plan for the 2014 or other elections for United States Congress that remedies these statutory and constitutional flaws; and

E. An order of this Court retaining jurisdiction over this matter until all Defendants have complied with all orders and mandates of this Court; and

F. An order requiring Defendants to pay all costs including reasonable attorneys' fees, and

G. Such other and further relief as the Court may deem just and proper.

Dated: September 18, 2013.

Respectfully submitted,

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Congressional Intervenors

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, ET AL.,	§	
Plaintiffs	§	
	§	
VS.	§	**Civil Action**
	§	**No. 11-CV-**
STATE OF TEXAS, ET AL.,	§	**360-OLG-JES-**
Defendants.	§	**XR**
	§	**[Lead Case]**
	§	
	§	
MEXICAN AMERICAN	§	
LEGISLATIVE CAUCUS,	§	
(MALC)	§	
Plaintiff,	§	
	§	
VS.	§	**Civil Action**
	§	**No. 11-CV-361**
STATE OF TEXAS, ET AL.,	§	**OLG-JES-XR**
Defendants.	§	**[Consolidated**
	§	**Case]**
	§	
TEXAS LATINO	§	
REDISTRICTING	§	
TASK FORCE, ET AL.,	§	
Plaintiffs,	§	
	§	
VS.	§	**Civil Action**
	§	**No. 11-CV-**

RICKPERRY,	§	**490-OLG-JES-**
Defendant.	§	**XR**
	§	**[Consolidated**
	§	**Case]**
_____	§	
	§	
MARGARITA V. QUESADA, ET AL.,	§	
Plaintiffs,	§	
	§	
VS.	§	**Civil Action**
	§	**No. 11-CV-**
RICK PERRY, ET AL.,	§	**592-OLG-JES-**
Defendants.	§	**XR**
	§	**[Consolidated**
_____	§	**Case]**
	§	
JOHN T. MORRIS,	§	
Plaintiff,	§	
	§	**Civil Action**
VS.	§	**No. 11-CV-**
	§	**615-OLG-JES-**
STATE OF TEXAS, ET AL.,	§	**XR**
Defendants.	§	**[Consolidated**
	§	**Case]**
_____	§	
EDDIE RODRIQUEZ, ET. AL.,	§	
Plaintiffs,	§	
	§	**Civil Action**
VS.	§	**No. 11-CV-**
	§	**635-OLG-JES-**
RICK PERRY, ET. AL.	§	**XR**
Defendants.	§	**[Consolidated**

	§	Case]
	§	
WENDY DAVIS, ET AL.,	§	
Plaintiffs	§	
	§	**Civil Action**
VS.	§	**No. 11-CV-**
	§	**788-OLG-JES-**
RICK PERRY, ET AL.,	§	**XR**
Defendants.	§	**[Consolidated**
	§	**Case]**

TEXAS DEMOCRATIC PARTY AND GILBERTO HINOJOSA'S FIRST AMENDED CROSS-CLAIM

Texas Democratic Party and Gilberto Hinojosa (hereinafter "TDP") make this Cross-Claim as follows:

I.

Introduction

1. The State's 2011 plans to redistrict the Texas House of Representatives and the Texas Delegation to the United States House of Representatives are blatant partisan gerrymanders that are designed to ensure that Republicans continue to control the Texas Congressional Delegation and the Texas House of Representatives to a much farther degree than the voting population would support. Because the maps adopted in 2013 keep intact much of the 2011 maps, those plans are equal partisan gerrymanders. The fact these maps were designed with strict partisan purposes is not in dispute and has been conceded by almost every, if not every, officer involved in the drawing of the plans. The 2013 plans include a number

of congressional and house districts that far exceed Republican's share of the State's electorate. The evidence demonstrates that the Defendants improperly used race in drawing its maps and for the reasons stated by other Plaintiffs, these maps violate federal anti-discrimination laws. That said, to the degree the Court determines that voters who align with the Democratic Party were targeted, in addition to or instead of racial targeting, the plans remain unlawful under now existing federal law. The State, in redistricting or otherwise, cannot lawfully target voters simply because those voters support a particular Party or ideology.

II.
Jurisdiction and Venue

2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 1357, and 2284; and pursuant to 42 U.S.C. §§ 1983 and 1973j(f). Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201, 2202, and 2284, as well as by Rules 57 and 65 of the Federal Rules of Civil Procedure. Venue is proper pursuant to 28 U.S.C. § 1391(b).

III.
Parties

3. Cross-Claimant, the Texas Democratic Party, is one of the two major political parties in Texas and is formed under provisions of the Texas Election Code. It may be served through its counsel herein. It brings suit on behalf of itself and its thousands of members statewide.

4. Cross-Claimant, Gilberto Hinojosa, is the duly elected Chairman of the Texas Democratic Party and the State Democratic Executive Committee, as recognized

under Texas election laws. Cross-Claimant Hinojosa is a registered and participating voter in Cameron County, Texas and may be served through counsel herein.

5. Cross-Defendant, RICK PERRY, is the Governor of the State of Texas and Chief Executive Officer of the State of Texas. Cross-Defendant PERRY is sued in his official capacity.

6. Cross-Defendant, JOHN STEEN, is Texas Secretary of State. Cross-Defendant STEEN is sued in his official capacity. Cross-Defendant STEEN is responsible for administering and supervising the elections of United States Representatives from the State of Texas. Cross-Defendant STEEN is responsible for administering and supervising the elections of the Texas House of Representatives.

IV.
Facts

7. In 2011, the Texas Legislature adopted redistricting plans for the Texas House of Representatives and for the United States House of Representatives.

8. Pursuant to §5 of the Voting Rights Act, the State of Texas submitted these plans to the United States Department of Justice and the United States District Court for the District of Columbia (DC Court) for preclearance.

9. After trial, the DC Court denied preclearance and objected to the plans for multiple reasons.

10. Before the DC Court could rule on preclerance, this Court enjoined these plans relying at least in part of the mandatory injunction provisions under Section 5.

11. In order for elections to timely occur, this Court drew its own plans, a Supreme Court appeal ensued, and then this Court drew additional new plans.

12. The Court drawn plans were used in the 2012 election and then were recently adopted, with some modification by the Texas Legislature resulting in what is termed here as the 2013 plans.

13. Due to the requirements of the ruling by the Supreme Court in the appeal of this case, the new plans that went into effect by order of this Court, and then adopted by the Legislature, included the vast majority of the characteristics of the original plans adopted by the Legislature in 2011.

14. TDP had originally sued in this Court objecting to the 2011 plans under Section 5 and also claiming the plans were unconstitutional gerrymanders. *See* Dkt. # 55.

15. This Court dismissed the political gerrymander claims (Dkt. # 285) and TDP filed a Motion to Reconsider (Dkt. # 384) in order to alleviate the need for an immediate Supreme Court appeal. The Court has now ruled the 2011 partisan gerrymander claims are dismissed but has granted TDP leave to file a political gerrymander claim against the 2013 plans (Dkt. # 886).

16. As the Court is aware from earlier briefing, five justices on the Supreme Court have supported the theory of a political gerrymander claim only to avoid granting

such relief under such claims due to the concern that an unworkable standard for such claims does not exist.

17. Here, TDP claims a standard is unnecessary given the factual admission by the State officers that their plan was drawn with unreserved political motivation. Furthermore, given that the trial evidence demonstrates population deviation was utilized in the State House map as the principal method to obtain the sought political ends, TDP urges this case presents a meaningful standard (*e.g.*, *Cox v. Larios*, 124 S.Ct. 2806 (2004)) to allow a political gerrymander claim.

18. TDP intends to show that evidence proves the 2013 plans adopted are, in addition to being racially discriminatory, are illegal political gerrymanders, and therefore should not, in accordance with the law, take effect.

19. Allowing the plans to take effect would significantly harm the First Amendment speech and associational rights of Cross-Claimants.

20. The plans, as adopted, fail to provide fair and reasonable districts in proportion to the members of Cross-Claimants' political association.

V.

Claims

Count
1
Equal Protection

24. Plaintiffs re-allege the facts set forth in the paragraphs above.

25. The partisan classifications in the 2013 Plans were applied in an invidious manner and in a way unrelated to any legitimate legislative objective. The 2013 Plans are intentional partisan gerrymanders that thwart majority rule and are an affront to basic democratic values in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; Article I, Sections 2 and 4, of the United States Constitution and the First Amendment to the United States Constitution. The Legislature's actions in adopting the plans in 2013 were themselves illegal partisan decisions. Indeed, the evidence demonstrates that the plans were crafted to give particular and distinct benefit to one classification of voters over another.

Count

2

First Amendment

26. Plaintiffs re-allege the facts set forth in the paragraphs above.

27 The 2013 Plans are invidious to the First Amendment Speech and Associational Rights of Plaintiffs. TDP, its Chairman, and the citizens members of the TDP may not be lawfully targeted by the government simply because of their partisan and political beliefs. TDP, its Chairman, and the citizens members of the TDP may not constitutionally suffer from the dilution of their vote due to a violation of the First Amendment. TDP, its Chairman, and the citizens members of the TDP suffer unique harm when the state adopts redistricting plans for the purpose of preventing the effective vote of a

class of persons, in this case people who align with and are members of the Democratic Party.

VI.
Prayer for Relief

WHEREFORE, Cross-Claimants respectfully pray that this Court:

1. Issue a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rules of Civil Procedure Rule 57, declaring that the 2013 Plans for redistricting of the Texas House of Representatives and the Texas Delegation to the United States House of Representatives are unconstitutional political gerrymanders in violation of the First and Fourteenth Amendments to the United States Constitution and Article I of the United States Constitution; and cannot be administered.

2. Issue preliminary and permanent injunctions enjoining the Cross-Defendants, their agents, employees, and those persons acting in concert with them, from enforcing or giving any effect to the proposed district boundaries, including enjoining Cross-Defendants from conducting any elections based on the 2013 Plans.

3. Make all further orders as are just, necessary, and proper to ensure complete fulfillment of this Court's declaratory and injunctive orders in this case.

4. Issue an order requiring Defendants to pay Plaintiffs' costs, expenses, and reasonable attorneys' fees incurred in the prosecution of this action, as

authorized by the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988.

Grant such other and further relief as it seems is proper and just.

Dated this 18th day of September, 2013.

Respectfully submitted,

By: */s/ Chad W. Dunn*

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ATTORNEY FOR TEXAS DEMOCRATIC PARTY AND GILBERTO HINOJOSA, IN HIS CAPACITY AS CHAIR OF THE TEXAS DEMOCRATIC PARTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, *et al.*, Plaintiffs, and UNITED STATES of AMERICA, Plaintiff-Intervenor, v. STATE OF TEXAS, *et al.*, Defendants.	Civil Action No. 5:11-cv-360 (OLG-JES-XR) Three-Judge Court [Lead Case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), Plaintiff, v. STATE OF TEXAS, et al., Defendants.	Civil Action No. 5:11-cv-361 (OLG-JES-XR) Three-Judge Court [Consolidated Case]

TEXAS LATINO REDISTRICTING TASK FORCE, *et al.*, Plaintiffs, v. RICK PERRY, Defendant.	Civil Action No. 5:11-cv-490 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
MARGARITA V. QUESADA, *et al.*, Plaintiffs, v. RICK PERRY, *et al.*, Defendants.	Civil Action No. 5:11-cv-592 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
JOHN T. MORRIS, Plaintiff, v. STATE OF TEXAS, *et al.*, Defendants.	Civil Action No. 5:11-cv-615 (OLG-JES-XR) Three-Judge Court [Consolidated Case]

EDDIE RODRIGUEZ, *et al.*, Plaintiffs, v. RICK PERRY, *et al.*, Defendants.	Civil Action No. 5:11-cv-635 (OLG-JES-XR) Three-Judge Court [Consolidated Case]

COMPLAINT IN INTERVENTION

The United States of America, plaintiff-intervenor herein, alleges:

1. The Attorney General files this complaint under Sections 2 and 12(d) of the Voting Rights Act, 42 U.S.C. §§ 1973 and 1973j(d), to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments to the United States Constitution.

JURISDICTION AND VENUE

2. This Court has original jurisdiction of this action under 42 U.S.C. § 1973j(f) and 28 U.S.C. §§ 1331, 1345, and 2201(a).

3. A three-judge district court is required under 28 U.S.C. § 2284(a).

4. Venue is proper in this Court under 28 U.S.C. § 1391(b).

PARTIES

5. The Attorney General is authorized to file this action in the name of the United States. 42 U.S.C. § 1973j(d).

6. The State of Texas is a state of the United States and is obligated to comply with Section 2 of the Voting Rights Act. From 1975 until the Supreme Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), Texas was subject to the preclearance requirements of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, through the coverage formula in Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b.

7. John Steen is the Secretary of State and chief election officer of the State of Texas. He is sued in his official capacity.

ALLEGATIONS

Background

8. Between 2000 and 2010, the total population of Texas increased by 4,293,741 persons, and 89.2 percent of that growth was attributable to the State's minority population. Specifically, the State's Hispanic population growth comprised 65 percent of the increase, the African American population growth comprised 13.4 percent of the increase, and Asian population growth comprised 10.1 percent of the increase.

9. Following the release of 2010 Census data, the Texas legislature was required to draw new boundaries for its Congressional and state legislative districts to account for

the State's population growth and the apportionment of four additional seats to its Congressional delegation.

10. The Texas legislature passed a new redistricting plan for the State House of Representatives on May 23, 2011, and Governor Rick Perry signed it into law on June 17, 2011. That plan is known as H283.

11. Plan H283 became effective under Texas law on August 29, 2011, but it was unenforceable because the State had not obtained preclearance under Section 5 of the Voting Rights Act.

12. The Texas legislature passed a new Congressional redistricting plan on June 24, 2011, and Governor Rick Perry signed it into law on July 18, 2011. That plan is known as C185.

13. Plan C185 became effective under Texas law on September 28, 2011, but it was unenforceable because the State had not obtained preclearance under Section 5 of the Voting Rights Act.

Background on Redistricting Litigation

14. Texas sought preclearance under Section 5 of the Voting Rights Act for the 2011 Congressional and House plans by filing a declaratory judgment action in the United States District Court for the District of Columbia. *See Texas v. United States*, No. 1:11-cv-1303 (D.D.C. filed July 19, 2011).

15. On September 29, 2011, this Court enjoined implementation of the 2011 Congressional and House

redistricting plans on the ground that Texas had not yet obtained preclearance for either plan under Section 5 of the Voting Rights Act. *See Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. Sept. 29, 2011) (ECF No. 380).

16. On August 28, 2012, following a two-week bench trial, a three-judge court of the U.S. District Court for the District of Columbia denied preclearance of the 2011 Congressional and House plans under Section 5. The court concluded that the State had failed to meet its burden under Section 5 to prove that it had not acted with discriminatory intent in adopting the Congressional plan, C185. *See Texas v. United States*, 887 F. Supp. 2d 133, 138, 159-65 (D.D.C. 2012) (three-judge court), *vacated*, 133 S. Ct. 2885 (2013). Indeed, the D.C. Court observed that "[t]he parties have provided more evidence of discriminatory intent [about the Congressional plan] than we have space, or need, to address here." *Id.* at 161 n.32. The court further concluded that the State had failed to meet its burden under Section 5 to establish the absence of discriminatory effect in the State House plan, H283. *See id.* at 138, 166-77. Because the D.C. Court determined that the State had failed to establish that its 2011 House plan would not have a discriminatory effect, it did not analyze whether Texas had established that the plan did not intentionally discriminate against minority voters. Nevertheless, the court noted that the United States and Defendant-Intervenors had presented "record evidence that cause[d] concern" that the House plan may have been adopted with discriminatory purpose. *Id.* at 177-78.

17. After entry of judgment, Texas appealed the denial of preclearance to the U.S. Supreme Court. *See* Notice of

Appeal, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Aug. 31, 2012) (ECF No. 234).

18. On June 27, 2013, the Supreme Court entered an order vacating the judgment of the D.C. Court in *Texas v. United States* and remanding the case for further consideration in light of *Shelby County* and "the suggestion of mootness" made in a filing concerning the 2011 plans. *Texas v. United States*, 133 S. Ct. 2885 (2013).

The 2011 Congressional Plan

19. A combination of direct evidence, discriminatory impact, and other circumstantial evidence—including the sequence of events preceding redistricting, procedural and substantive deviations from redistricting principles, and the historical background of previous discrimination in redistricting—establishes that Texas enacted the 2011 Congressional plan with the intent to discriminate against minority voters.

Direct Evidence of Discriminatory Intent

20. Individuals who played key roles in the 2011 redistricting process devised a method—which they discussed by email—to make it more difficult for Hispanics to elect their candidates of choice in certain districts while preserving the appearance of Hispanic population majorities.

21. The plan entailed redrawing districts to increase their Hispanic Citizen Voting Age Population (CVAP) while simultaneously decreasing Hispanic voter turnout in those districts by removing precincts with high-turnout Hispanic voters. These plans are revealed in e-mail

exchanges between legislative staff and are evident in the redrawing of districts for the 2011 Congressional plan.

Race-Based Splitting of Precincts

22. The 2011 Congressional plan purposefully split precincts on the basis of race and ethnicity to dilute minority voting strength.

23. The Texas Senate and House Redistricting Committees had a policy to minimize the splitting of voting tabulation districts (VTDs), which are equivalent to precincts.

24. Although political data—*i.e.*, election returns, voter registration, and turnout—are compiled at the precinct level in Texas, that information is not available for smaller geographic areas such as census blocks. Data about the race of the inhabitants is, however, available below the precinct level.

25. The 2011 Congressional plan split 518 precincts, significantly more than is necessary to minimize the population deviation among the Congressional districts.

26. The precinct splits in the 2011 Congressional plan primarily were concentrated in minority communities.

27. The 2011 Congressional plan purposefully fragmented minority communities and placed them in separate districts to prevent minority voters from having an opportunity to elect representatives of their choice. The fragmentation cannot be explained by traditional raceneutral redistricting principles. For example, District

26 included a lightning-bolt shaped extension into Tarrant County to append only the Hispanic community there to primarily Anglo Denton County.

Discriminatory Impact

28. The 2011 Congressional plan would have a discriminatory impact on minorities, and this impact provides additional evidence that the plan was adopted with a discriminatory purpose.

29. Despite dramatic minority population growth in the last decade, the 2011 Congressional plan for Texas did not create any additional Congressional districts in which minority voters would have the opportunity to elect candidates of choice.

30. The configurations of the districts in the 2011 Congressional plan for Texas provide additional evidence of purposeful discrimination. For example, District 6 extended a finger-like appendage into majority-minority areas of Dallas and Tarrant counties and appends those communities to primarily Anglo Ellis and Navarro counties and another portion of Tarrant County. This has the effect of submerging these majority-minority areas into a majority-Anglo district.

31. The 2011 Congressional plan for Texas purposefully packed minorities into certain districts to dilute overall minority voting strength. For example, to prevent the emergence of a new district in the Dallas-Fort Worth Metroplex in which minority voters would have the opportunity to elect representatives of their choice, the 2011 plan increased the combined African-American and Hispanic population of District 30 from 81.3% to 85.2%.

32. The 2011 Congressional plan for Texas made substantial changes to three Congressional districts in which African-American voters have the ability to elect their preferred candidates, even though 2010 Census data showed that those districts were already close to the correct size.

33. The 2011 Congressional plan for Texas removed key economic engines and cultural facilities—such as medical and convention centers, sports arenas, and universities—from several majority-minority Congressional districts but not from majority-Anglo districts.

34. The 2011 Congressional plan for Texas removed already-established Congressional district offices from several majority-minority Congressional districts but not from majority-Anglo districts.

35. The 2011 Congressional plan for Texas drew the home of one African American member of Congress out of her district but did not draw the homes of any Anglo members out of their districts.

Procedural Departures from Texas's Usual Redistricting Practices

36. The redistricting process leading to the enactment of the 2011 Congressional plan for Texas departed from normal procedures followed by the Texas legislature in previous redistricting cycles.

37. Unlike past redistricting cycles, plans and election data relevant to the 2011 Congressional plan for Texas were not available for a sufficient period to allow for substantive public input.

38. The Texas House and the Senate each provided for only one hearing on the Congressional redistricting plan and provided less than 48 hours' notice before the hearings.

The 2011 State House Plan

39. A combination of direct evidence, discriminatory impact, and other circumstantial evidence—including the sequence of events preceding redistricting, procedural and substantive deviations from redistricting principles, and the historical background of previous discrimination in redistricting—establishes that Texas enacted the 2011 House plan with the intent to discriminate against minority voters.

Direct Evidence of Discriminatory Intent

40. As alleged above, individuals who played key roles in the 2011 redistricting process devised a method—which they discussed by email—to make it more difficult for Hispanics to elect their candidates of choice in certain districts.

41. Texas implemented this race-based strategy in adopting the 2011 House plan, especially in redrawing House District 117. In changing the boundaries of that district, Texas increased its Hispanic CVAP while simultaneously removing precincts where Hispanic voters turned out to vote at a high level and replacing them with

precincts whose Hispanic residents turned out at much lower rates. By doing so, Texas created the illusion of Hispanic electoral control in District 117 even though—in reality—the change eliminated the opportunity and ability of Hispanic voters to elect their candidates of choice.

42. State decision makers made public statements during the 2011 House redistricting process that indicate a racially discriminatory motive. For example, Texas state legislators—including State Representatives John Garza and Beverly Woolley—made comments indicating that their decisions during the 2011 House redistricting process were based, at least in part, on race and ethnicity.

Race-Based Splitting of Precincts

43. The 2011 House plan purposefully split precincts on the basis of race and ethnicity to dilute minority voting strength. This is particularly evident in House District 41, where six split precincts fenced out census blocks with significantly greater Hispanic population than those blocks that were included in the district.

44. As alleged above, the Texas House Redistricting Committee had a policy to minimize the splitting of precincts.

45. The Chair of that Committee rejected an amendment sponsored by a minoritypreferred Hispanic legislator on the ground that it violated this policy by splitting precincts.

46. Despite the Committee's policy of minimizing precinct splits, the 2011 Texas House plan split 412 precincts. This occurred even though there was no requirement—as there is with Congressional plans—that House districts have minimal population deviation. Deviations in district population biased the proposed House plan against minority voters by overpopulating districts in which minority voters have the opportunity to elect candidates of their choice, thereby limiting the number of such districts.

47. The precinct splits in the 2011 House plan primarily were concentrated in minority communities.

48. In the Section 5 preclearance action, the D.C. Court found that the lead mapdrawer for the House plan provided "incredible testimony" that "reinforces evidence suggesting mapmakers cracked [precincts] along racial lines to dilute minority voting power" and "suggests that Texas had something to hide in the way it used racial data to draw district lines." *Texas*, 887 F. Supp. 2d at 178.

Discriminatory Impact

49. The 2011 House plan would have a discriminatory impact on minorities, and this impact provides additional evidence that the plan was adopted with a discriminatory purpose.

50. Despite dramatic minority population growth in the last decade, the discriminatory intent is shown by the fact that the 2011 House plan for Texas reduced by five the number of districts that would provide minority voters with the ability to elect their candidates of choice. Under

the plan in effect prior to 2011, minority voters had the ability to elect their candidates of choice in 50 House districts. In the 2011 plan, that number was reduced to 45 districts, even though minority communities accounted for the overwhelming majority of Texas's population growth in the past decade.

51. The 2011 House plan for Texas purposefully packed minority population into certain districts to avoid creating—or to try to justify eliminating—districts in which minority voters would have the opportunity to elect candidates of choice. In Nueces County, for example, the State eliminated House District 33—a district represented by a Hispanic Republican in which minority voters had the ability to elect representatives of their choice—and protected the Anglo incumbent in District 32 by crafting a hook-shaped extension to pack Hispanic voters and potential Hispanic challengers (Republican and Democrat) into District 34.

52. The configurations of the 2011 House districts for Texas provide additional evidence of purposeful discrimination. One of the most vivid illustrations is the configuration of House District 41, an oddly shaped district designed to minimize the number of Hispanic voters in a district located in overwhelmingly Hispanic Hidalgo County. The district was underpopulated, and its borders split 17 precincts (more than 40% of the precincts in the district). The partial precincts in District 41 included census blocks with higher Anglo population and excluded homogenous Hispanic census blocks.

Procedural Departures from Texas's Usual Redistricting Practices

53. Unlike past redistricting cycles, plans and election data relevant to the 2011 State House plans for Texas were not available for a sufficient period to allow for substantive public input.

54. The chair of the Texas House Redistricting Committee released his statewide 2011 House plan proposal only two days before the first public hearing and required waiver of Texas's five-day posting rule, which is uncommon for a major bill such as redistricting.

55. Two public hearings concerning the 2011 House redistricting were conducted on a Friday and on Palm Sunday, limiting public participation.

56. The "County Line Rule" in Article III, Section 26 of the Texas Constitution states that if population will allow a district to be created without crossing county lines, then such a district should be created. The Texas Legislative Council Guidelines state that the County Line Rule should yield to the need for population equality or adherence to the Voting Rights Act.

57. Deviations from the County Line Rule in the 2011 House plan in Texas were permitted in Henderson County in order to comply with the federal one-person-one-vote requirement, but calls for deviation from the County Line Rule in order to comply with the Voting Rights Act in Nueces County—to protect a district in

which minority voters previously had the ability to elect their candidates of choice—were rejected.

58. The County Line Rule in the 2011 House plan in Texas was applied inconsistently from past practice in Harris County, providing legislators an excuse to eliminate House District 149, a district in which minority voters had the ability to elect their candidate of choice.

Intent Factors Common to Both Plans

The History of Discrimination in Texas

59. Under Supreme Court precedent, *see, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977), the examination of past discrimination is relevant to determining whether more recent government actions are intentionally discriminatory. Texas's history of official voting discrimination against its African-American and Hispanic citizens is longstanding and well-documented. *See, e.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439 (2006). This history of persistent racial discrimination provides circumstantial evidence of intentional discrimination in the 2011 Congressional and House plans.

The Sequence of Events

60. The sequence of events leading to the enactment of the 2011 Congressional and House plans for Texas reveals a pattern of excluding African-American and Hispanic representatives from the redistricting process while soliciting and implementing the preferences of Anglo representatives.

61. The sequence of events leading to the enactment of the 2011 Congressional and House plans for Texas also reveals a pattern of limiting the opportunity of African-American and Hispanic citizens to analyze and comment on the redistricting plans.

Substantive Departures from Texas's Usual Redistricting Practices

62. The redistricting process leading to the enactment of the 2011 Congressional and House plans for Texas departed from normal procedures followed by the Texas legislature in previous redistricting cycles.

Other Relevant Factors

63. Texas elections are marked by a pattern of racially polarized voting at virtually every level.

64. Many Hispanic and African-American citizens in Texas continue to suffer the effects of official discrimination, including a history of discrimination in voting-related activities.

65. The effects of discrimination on Hispanic and African-American citizens in Texas, including their markedly lower socioeconomic conditions relative to Anglos, continue to hinder their ability to participate effectively in the political process in Texas.

The Need for Section 3(c) Relief

66. As alleged above, the State of Texas has a history of intentional racial discrimination in redistricting. In each decennial redistricting cycle since 1975, the Attorney General has interposed an objection under Section 5 or

the D.C. District Court has denied preclearance to at least one of the State's statewide redistricting plans.

67. Outside the redistricting context, the State of Texas has employed a variety of devices to restrict minority voters' access to the franchise.

68. In the absence of relief under Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c), there is a danger that Texas will continue to violate the Voting Rights Act and the voting guarantees of the Fourteenth and Fifteenth Amendments in the future.

CAUSES OF ACTION

69. The United States re-alleges and incorporates by reference the allegations set forth above.

70. The State of Texas's 2011 Congressional delegation redistricting plan, Plan C185, was adopted with the purpose of denying or abridging the right to vote on account of race, color, or membership in a language minority group in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the voting guarantees of the Fourteenth and Fifteenth Amendments to the United States Constitution.

71. The State of Texas's 2011 State House redistricting plan, Plan H283, was adopted with the purpose of denying or abridging the right to vote on account of race, color, or membership in a language minority group in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the voting guarantees of the Fourteenth and Fifteenth Amendments to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, the United States prays that the Court enter an order:

(1) Declaring that the 2011 Congressional and House plans for Texas were adopted with the purpose of denying or abridging the right to vote on account of race, color, or membership in a language minority group in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the voting guarantees of the Fourteenth and Fifteenth Amendments to the United States Constitution;

(2) Retaining jurisdiction of this action under Section 3(c) of the Voting Rights Act for a period of ten years and ordering that during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced (May 9, 2011) shall be implemented by the State of Texas unless and until it receives preclearance for the voting change from the Attorney General or this Court; and

(3) Granting such additional relief as the interests of justice may require.

Date: September 25, 2013

Respectfully submitted,

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FILED
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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY /s/
DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, et al.	§	
	§	
Plaintiffs	§	CIVIL
v.	§	ACTION NO.
	§	5:11-CV-0360-
STATE OF TEXAS, et al.	§	OLG-JES-XR
	§	[Lead Case]
Defendants	§	

PLAINTIFFS' SIXTH AMENDED COMPLAINT

TO THE HONORABLE COURT:

Come Now, Shannon Perez, Gregory Tamez, Sergio Salinas, Carmen Rodriguez, Nancy Hall, Dorothy DeBose, Jessica Farrar, Wanda F. Roberts, Richard Nguyen Le, TJ Carson and League of United Latin American Citizens (collectively referred to herein as the "Perez Plaintiffs") and file their Sixth Amended Complaint and would show the court as follows:

I.
PARTIES

1. Plaintiff Shannon Perez is a Latina and a citizen and registered voter who resides and is domiciled in Bexar County, Texas.

2. Jessica Farrar is a Latina and a citizen and registered voter who resides in Harris County and a member of The Texas House of Representatives, representing the 148th Legislative District of Harris County.

3. Plaintiff Gregory Tamez is a Latino and a citizen and registered voter who resides and is domiciled in Bexar County, Texas.

4. Plaintiff Sergio Salinas is a Latino and a citizen and registered voter who resides and is domiciled in Hidalgo County, Texas.

5. Plaintiff Carmen Rodriguez is a Latina and a citizen and registered voter who resides and is domiciled in El Paso County, Texas.

6. Plaintiff Nancy Hall is an African-American and a citizen and registered voter who resides and is domiciled in Dallas County, Texas.

7. Plaintiff Dorothy DeBose is an African-American and a citizen and registered voter who resides and is domiciled in Tarrant County, Texas.

8. Plaintiff Wanda F. Roberts is an African-American and a citizen and registered voter who resides and is domiciled in McLennan County, Texas.

9. Richard Nguyen Le is an Asian-American and a citizen and registered voter who resides and is domiciled in Fort Bend County, Texas.

10. Plaintiff TJ Carson is an African-American and a citizen and registered voter who resides and is domiciled in Bell County, Texas.

11. Plaintiff, League of United Latin American Citizens, hereinafter LULAC, founded in 1929, is the oldest and largest Latino civil rights organization in the United States. LULAC is a non-profit organization with presence in most of the fifty states and Puerto Rico. LULAC has chapters in almost all counties in Texas and individual members in almost all of the counties. LULAC has long been active in representing Latino's and other minority interests in all regions of the state through advocacy and litigation.

12. Plaintiff LULAC joins this complaint for the limited purpose of challenging the redistricting of the Texas House of Representatives as set forth in paragraph 32 below.

13. Defendants are officials of the State of Texas thereof who have duties and responsibilities under the laws of the state to redistrict congressional and state legislative districts in Texas following the release of the decennial census.

14. Defendant Rick Perry is the Governor of the State of Texas and, under Article IV, Section I, of the Constitution of the State of Texas, is the chief executive officer of the State of Texas.

15. Defendant David Dewhurst is the Lieutenant Governor of Texas. Under Article IV, Section 16, of the Texas Constitution he is the President of the Texas Senate.

16. Defendant Joe Straus is the Speaker of the Texas House of Representatives and is the presiding officer over the Texas House of Representatives.

17. Defendant John Steen is the Secretary of State for the state of Texas and is the state's chief election officer, succeeding Hope Andrade.

II.
JURISDICTION AND VENUE

18. Plaintiffs' complaint arises under the United States Constitution and federal statutes to wit Section 2 of the Voting Rights Act, 42 U.S.C. §1973 et seq., and the Fourteenth and Fifteenth Amendments to the United States Constitution.

19. This court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 1357; and 42 U.S.C. §§ 1983 and 1988.

20. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

21. Plaintiffs seek declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202 and a remedy under the provisions of Section 3(c) of the Voting Rights Act, 42 U.S.C. 1973(a)c.

22. Plaintiffs request convening of a three-judge court pursuant to 28 U.S.C. § 2284.

III.
STATEMENT OF CLAIM

23. This amended pleading concerns the plans for future elections to the Texas House of Representatives and the election of the Texas Congressional delegation.

24. As this Court knows all too well, protracted litigation ensued following the Texas Legislature's adoption of Texas House and Congressional Redistricting, all evidenced in earlier orders of this Court. The outcome of this litigation was an order by this Court implementing for the 2012 election cycle interim election plans under which the 2012 elections were conducted. These plans were specifically limited to the 2012 elections.

25. In the 2013 regular session of the Texas Legislature, no action was taken on redistricting bills. However, since that time, the Governor called the Legislature into special session with the instructions to enact this Court's interim plans as the State's permanent redistricting plans. The Legislature dutifully complied and enacted S.B. 3 establishing districts for the Texas House of Representatives. S.B. 3 is identical to this Court's interim plan with the exception of minor

modification of two districts in Dallas County and 2 districts in Harris County, and minor modifications in Webb and Tarrant counties. The Legislature adopted S.B. 4 redistricting the Texas Congressional plan. S.B. 4 is identical in all respects to this Court's interim plan. The Governor has signed S.B. 4 and S.B.3 into law.

26. Although the Court has ordered that the 2014 elections be conducted under S. B. 3 (Plan H 358) and S. B. 4 (Plan C 185) as "interim plans", these plans will continue to violate the constitutional and statutory right of Plaintiffs to be protected from intentional discrimination on the basis of race and ethnicity in the redistricting process and to be secure from the dilution of their right to vote.

27. With respect to the reapportionment of the Texas Congressional seats, the original legislative plans intentionally discriminated against minority voters fragmenting them into disparate districts and diluting their voting strength. S. B. 4 carries forward many of these violations. The Court's interim plan, incorporated in S. B. 4, somewhat ameliorated this statutory and constitutional violation but the underlying injury to the minority voters remains unremedied and continuing in S. B. 4. The discriminatory intent is manifested throughout the congressional redistricting process as exemplified by the diminution of minority voting strength in District 23, the destruction of a functioning minority coalition in District 25, the failure to create an additional Latino opportunity district in South Texas, and the failure to create an additional minority opportunity district in the Dallas-Fort Worth Metroplex.

28. The original legislative enactment in 2011 reapportioning the Texas House intentionally discriminated against minority voters. The current enactment S. B. 3 perpetuates that discrimination and is littered with intentional diminution of minority strength and fragmentation of minority communities in violation of the 14th and 15th Amendments together with violations of 14th Amendment one person-one vote commands in the Districts we detail below.

A. Dallas County Districts 102, 105, 107 and 113;
B. Harris County Districts 132 and 135;
C. Fort Bend County District 26;
D. Tarrant County Districts 93 and 96;
E. Bell County District 54;
F. McLennan County District 56;

IV.
RELIEF REQUESTED

WHEREFORE, premises considered, Plaintiffs respectfully request the following relief:

A. That this court assume jurisdiction and request the convening of a three-judge court pursuant to 28 U.S.C. Sec. 2284.

B. Declare the existing plans for election of the Texas House of Representatives and Texas Congressional seats to be in violation of the Voting Rights Act and the 14th and 15th Amendments and enjoin their use in any future elections;

C. Issue an order pursuant to 42 U.S.C. 1973a(c) requiring Texas to preclear its election plans through the Department of Justice in accordance with the Voting Rights Act.

D. Award Plaintiffs a reasonable attorney's fees and costs; and

E. Grant such other relief as may be necessary and proper as the needs of justice may require, including appropriate injunctive relief.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, *et al.*, *Plaintiffs*, v. STATE OF TEXAS, *et al.*, *Defendants*.	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]

DEFENDANTS' ADVISORY TO THE COURT

In response to the Court's request at the hearing held on April 27, 2017, Defendants advise the Court that during the week of June 26 to June 30, 2017, a bench trial is scheduled in Cause No. D-1-GN-15-004391; ***Bailey, et al. v. Texas Parks and Wildlife Department, et al.***; in the District Court of Travis County, Texas. Lead counsel for the State of Texas in this case also serves as lead counsel for the Texas Parks and Wildlife Department in Cause No. D-1-GN-15-004391. Although dispositive motions have been filed in that case, it is currently scheduled for a bench trial at that time. Defendants request that this Court does not set any hearings or trial during that week.

Defendants also wish to provide the Court with additional details about the deadline for providing voter-registration-certificate templates to county election officials. According to the Texas Secretary of State, October 1, 2017, a Sunday, is the last possible date when

individual voter-registration-certificate templates must be provided by the Secretary of the State to each of the 254 county election officials in the State of Texas. Historically, those templates have been provided to county election officials during the summer in such a way as to coincide with the County Election Official's Annual Seminar. Pursuant to Section 14.001 of the Texas Election Code, the voter election certificates must be mailed to individual voters on or after November 15, but before December 6, 2017.

The election-certificate templates must be provided to the counties by October 1, 2017, as each individual county must print the necessary election certificates for every registered voter with an active registration and mail the certificates within the statutory deadline. Counties must get their certificates printed by a third-party vendor and validate the color sample provided against the color sample provide by the Secretary of State, which includes validation of the certificate wording. Each step in the process can take several weeks, and many counties use third-party vendors to mail the election certificates. Counties using third-party vendors to mail their certificates often require additional timing for the print and mail shop to produce, cut, and mail the certificates on behalf of the county. To allow this process to occur without interruption and meet the statutorily imposed deadlines for election certificate mailing, any precinct changes would need to be implemented by October 1, 2017.

Date: May 1, 2017

Respectfully submitted.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, ET AL, Plaintiffs,	)	
	)	No. SA:11-CV-360
vs.	)	
	)	San Antonio, Texas
RICK PERRY, ET AL, Defendants.	)	July 10, 2017

TRANSCRIPT OF TRIAL DAY I

BEFORE THE HONORABLE ORLANDO L. GARCIA, THE HONORABLE XAVIER RODRIGUEZ, UNITED STATES DISTRICT JUDGES, AND THE HONORABLE JERRY E. SMITH, UNITED STATES CIRCUIT JUDGE

[5] * * * MR. GARZA: Jose Garza for the Mexican American Legislative Caucus. And we call Mr. George Korbel. Mr. Korbel will testify about the demographic changes in the [6] state of Texas and on redistricting plans that he has developed for the plaintiffs on the state house of representatives today.

* * *

THE DEPUTY CLERK: Please raise your right hand. Do you solemnly swear that the testimony which you are about to give in the matter now before the Court will be

the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

GEORGE KORBEL, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

* * *

[25] * * * BY MR. GARZA:

Q. Can I call your attention now to Exhibit Number 12, Mr. Korbel. We're going to focus on Nueces County for a moment.

A. Yes.

Q. Now, you recall there's been a lot of discussion about [26] whether two minority opportunity -- two Hispanic opportunity districts out of Nueces County could be developed.

Did you make an effort to draw two wholly contained minority districts in Nueces County?

A. Yes, I did.

Q. And were you successful?

A. I was able to draw two state house districts that would be totally contained within Nueces County that would each be more than 50 percent Hispanic citizen voting age population.

But when I looked at the election returns that we received from the legislative counsel, I found that those

districts did not perform very well. In fact, one performed not at all, and the other one only performed sporadically. Where – when I say "performed," I mean the trace of the minority community was elected.

Q. Okay. So let me call your attention to Plaintiffs' Exhibit 13.

A. Yes.

Q. And is that the comparison that you alluded to?

A. Yes.

Q. And before you start, you made an assumption in that – in developing that exhibit; is that correct?

A. Yes, I did.

Q. You didn't do racially polarized voting analysis for this case?

[27] A. I didn't.

Q. And you didn't determine the Latino-preferred candidate of choice in this case?

A. I didn't.

Q. What assumption did you make to analyze those two districts?

A. Well, my assumptions were based on the expert reports from the people who did regression analysis and on my understanding of the testimony of Dr. Alford at his deposition, that the choice of the minority community was consistently the democrat candidate.

Q. So this is a measure of the Latino-preferred candidate as measured by whether the democrat won in those districts?

A. That's correct.

Q. And what elections did you review?

A. I looked at all of the statewide exogenous elections from 2010 through 2016. That was a total of where there was a democratic candidate. That was a total of 30 elections.

Q. And what was the result, as you indicated?

A. In the benchmark Plan 358 for Corpus Christi, District 32, in none of the exogenous elections was the minority -- was the choice of the minority community successful. And in 34, 28 of the 35 statewide.

Q. So just to be clear --

A. Yes.

[28] Q. -- the plan that -- the two districts are contained in what's called H400?

A. Yes.

Q. That's the plan that you tried to draw two wholly contained districts, Latino-majority CVAP districts, Nueces County?

A. Yes.

Q. So District 32 in Plan H400 is successful in 7 out of the 35 races that you looked at?

A. 7 out of the 35, yes.

Q. And District 34, in none of them were they successful?

A. Not successful in any, no.

Q. So you couldn't draw two districts wholly contained within Nueces County that were Latino CVAP majorities and were both performed for the Latino community?

A. I could not, no.

Q. Okay. So, as a result of that, in Plan 391, H391, did you open up the county line for -- to draw a district in Nueces County?

A. I did.

* * *

[29] * * * Q. So would you explain to the Court the manner in which you drew the two districts that were anchored in Nueces County?

A. I took Kleberg County and left Kleberg County whole and then poured population from Nueces County into the -- into a district with -- 32, which included Kleberg County. It's primarily a Nueces County district, but it includes Kleberg County.

Q. All right. And the balance of Nueces County?

A. I created a District 34 in the -- in the western part of Corpus Christi and Robstown, which is essentially where it is now. And then the balance of the population went north into a District 30, including Aransas County and counties north of that.

* * *

[30] * * * Q. Now, in Nueces County district that you drew, HD32, how did it perform now by opening up the county line?

A. By opening up the county line, if you look at – it would not have been successful in any of the elections in 2010. But that's a long time ago. If you look at the elections in 2012 through 2016, that would be a total of 25 elections, and it was successful in 12 of those 25 elections.

Q. All right. And in each of these districts, in 2016 all performed almost 100 percent?

A. Yes. Each of these -- each of these districts in the most recent elections performed at almost 100 percent.

* * *

[CROSS-EXAMINATION BY MR. SWEETEN:]

[65] * * * Q. Okay. There are exactly two house districts in Nueces County right now, correct?

A. That's correct.

Q. And Plan H391, you've made it into three districts, correct?

A. That's correct.

Q. And two of those districts across the Nueces County line, right?

A. Yes. The Nueces County line is split.

Q. You have a northern protrusion from the county line and a southern one that goes down into Kleberg County, correct?

A. Yes.

Q. And the house district that remains in place is HD34, [66] correct? Within Nueces County.

A. Yes.

Q. Abel Herrero's district?

A. Yes.

Q. Based on your experience, it is not possible to draw two Hispanic opportunity districts contained wholly within Nueces County, at least not two that perform, correct?

A. That's correct.

Q. It's also true, isn't it, that it's not possible to draw two performing Hispanic opportunity districts wholly or partly in Nueces County by crossing the county line only once, right?

A. That is correct. But it would be physically impossible not to do that because –

Q. You're saying so it's not possible to draw two -- an additional district that doesn't cross two portions of the county line in Nueces, right?

A. That's correct.

Q. Now, you would agree with me that Plan HD391, it joins several areas from Nueces County. It goes north – If we could zoom in on Nueces County.

So this is your Plan H391, correct? And it shows that District 30 goes -- takes part of Nueces County, goes north into Aransas, correct?

A. That's correct.

[67] Q. Picks up those islands off the coast from Nueces to Aransas County, correct?

A. That's correct.

Q. And that it also -- what's not shown here is that 30 also adds an additional county, correct?

A. Yes.

Q. And that's Victoria County, correct?

A. It does.

Q. An inland county, right?

A. It is, yes.

Q. You pair -- in this drawing that splits two places in the Nueces County line, you pair longtime member Geanie Morrison and Representative Todd Hunter, correct?

A. There is a pairing, yes.

Q. Okay. And that pairing is those two individuals, right?

A. Yes.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, ET AL, Plaintiffs,	)	
	)	No. SA:11-CV-360
vs.	)	
	)	San Antonio, Texas
RICK PERRY, ET AL, Defendants.	)	July 11, 2017

TRANSCRIPT OF TRIAL DAY II

BEFORE THE HONORABLE ORLANDO L. GARCIA, THE HONORABLE XAVIER RODRIGUEZ, UNITED STATES DISTRICT JUDGES, AND THE HONORABLE JERRY E. SMITH, UNITED STATES CIRCUIT JUDGE

* * *

[622] * * * MR. BITTER: Your Honors, we call Conor Kenney to the stand. Just so the Court is aware, Mr. Kenney was the chief of staff for Representative Burnam during the 2013 session. We heard yesterday deposition testimony from Representative Burnam. Mr. Kenney was the individual who drafted the amendment that affected HD90.

THE CLERK: Would you raise your right hand.

(The oath was administered)

CONOR KENNEY, DEFENDANT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. BITTER:

Q. Hi, Mr. Kenney. Adam Bitter for the defendants, the Attorney General's office. Could you please introduce yourself to the Court?

A. My name is Conor Kenney.

Q. Mr. Kenney, during the 2013 legislative session, where did you work?

A. I worked for State Representative Lon Burnam.

Q. Which district did Representative Burnam represent?

A. HD90.

Q. What was your position?

A. I was the chief of staff.

* * *

[631] * * * Q. Mr. Kenney, are you aware whether there were requests from the public in 2011 to put Como back into House District 90?

A. Yes, we received a letter from one of the precinct chairs who I think was also the chair of the Como Neighborhood Association or advisory committee, something like that. And Dorothy DeBose, I believe her name is, and she wrote Representative Burnam a letter, very upset about -- in the letter I think it was dated sometime I think maybe

A. Well, this one is made to Representative Burnam, and there was another letter to Representative Geren that made basically the same point.

* * *

Q. Mr. Kenney, what is the -- to the extent you know, what is the demographic makeup of the Lake Como area?

A. It's predominantly African American.

Q. And in the 2011 plan, where were the residents of Lake Como put into, what district?

A. They were put into District 99.

[633] Q. And who is the representative for that district?

A. Representative Charlie Geren.

* * *

[634] * * * Q. At some point during the 2013 special session, did you begin drawing potential amendments to House District 90's configuration?

A. I think I'd been noodling around on the redistricting software a little bit. I didn't draw a plan for quite a while, not really until we learned that leadership would actually be entertaining some amendments. Prior to then, the word was that the bulk of the leadership was going to ratify the Court-ordered map and that no amendments were going to be accepted.

So while we had kicked around some ideas to make a statement about the redistricting in Tarrant County in general and with District 90 in particular, you know, I wouldn't say that we really began earnestly working on an

actual proposal until, you know, in the days before the floor hearing.

Q. Well, and let's focus on the time during the special session then. At some point were you asked to draw amendments to House District 90?

A. Yes.

Q. And who asked you to do so?

A. Representative Burnam.

Q. Was Representative Burnam the only person who asked you to [635] draw changes to House District 90?

A. That's correct.

Q. Did Representative Burnam provide any instructions to you in drawing potential amendments?

A. Yes.

Q. And what were those specific instructions?

A. The first instruction was, according to what we had heard, which was that only simple amendments between two, maybe three members that didn't really change very much would be accepted and then actually heard on the floor. So according to that, my instructions were see if you can work something out in swaps between 90 and 99 that bring the Como neighborhood back into 90.

Q. And were those instructions provided by Mr. -- by Representative Burnam?

A. That's correct.

Q. And do you know why he gave you -- what the basis was for those instructions from him?

A. Yeah. I mean, we discussed at length the Como neighborhood and why he thought it should be back in the district.

Q. And what was the goal behind any of redrawing of HD90 from your office's perspective?

A. Simply to bring Como back into the district.

* * *

[636] * * * Q. Who was responsible for drawing maps in Representative Burnam's office?

A. I was.

Q. I'm sorry. Was there anybody else who was involved in that?

A. No.

Q. Did you use RedAppl in drawing maps?

A. Yes.

[637] Q. Was there anyone else in Representative Burnam's office that used RedAppl?

A. No.

Q. What was Representative Burnam's role in drafting the maps?

A. He gave me instructions for the first map, and then after we discussed the first map, gave me instructions for the second map.

Q. Did Representative Burnam sit with you or otherwise

provide thoughts as you were drafting the changes to House District 90?

A. No. At this point the -- I mean, the special session is in full swing, and he was pretty much on the floor most of the day. So I would be sitting up in the office. We have kind of a direct line between his desk and my office and we talk on that, but not personally there, no.

Q. I want to ask you about the process that you undertook to draft amendments to changes to House District 90. What data were you using as you first started drafting a map?

A. Well, the first round, I think I really only looked at the population deviation because I simply grabbed the Lake Como precincts, pulled them in and then I think we were maybe a little over. And I may have grabbed one or two other precincts and put them in the District 99, but it was really precinct level and I didn't -- as I was making it, I didn't look at any [638] of the demographic information or anything like that.

Q. What was the goal -- as you were drafting it, what was your goal in preparing this draft?

A. Simply to bring Lake Como into the district.

Q. After you finished with this initial draft of the map, did you provide a copy of it to anyone?

A. Yes. As just an informal kind of temperature check, I walked it over to Representative Martinez-Fischer's office and we consulted with Mr. Golando there and just asked him what he thought of it, what his temperature was on it.

Q. Do you recall what information you provided Mr. Golando whether it be a map or any other kind of data?

A. I recall his feedback to me, and actually I can't recall if I shared it with him electronically or if I showed him a printout or something. But his feedback was that was -- related to the Spanish surname voter registration, so I assumed I either gave that to him or he looked it up.

Q. And what was the information that Mr. Golando told you about his view of the first proposed map?

A. He said he doubted that members of the Mexican American Legislative Caucus would support a map that brought the SSVR below 50 percent for that district.

Q. And what did he indicate that the concern was with that drawing of the map?

A. I don't think he indicated what the value behind that [639] concern was. You know, I mean, just implicitly I mean 50 percent is control. SSVR tracks pretty well with voter turnout so --

Q. Had Mr. Golando requested a copy of the map?

A. No. Now, I may have given it to him, but it was of my own initiation.

Q. I want to pull up DX799, please.

And this is Plan -- it's indicated as Plan H328. I don't know if you recall seeing a copy of this at your deposition, but is this a copy of the first draft map that you're referring to?

A. Yes, looks like it. Yeah.

Q. And if we can go to Page 2, please.

And if we look at Page 2, this is another Red 202 report. If we focus in on House District 90, total voter registration SSVR, what is the number there?

A. 48.2 percent.

Q. And was that lower than what the SSVR was in the 2011 enacted plan?

A. Yes. I recall it being 51.1, I think. 51.2.

Q. And so when you were finished with the first draft of the map, did you recognize that the SSVR had gone down a couple of percentage points?

A. Yeah. When Mr. Golando pointed out, you know, I certainly was -- had a pause and said, okay. I got to talk to my boss [640] about this.

Q. Was it significant to you that -- was it significant for you that the SSVR of House District 90 would go above 50 percent?

A. Was it significant to me that it would go above?

Q. Was that -- was that a -- when you saw that it was below 50 percent, what was your view of that?

A. Well, I knew that it practically, you know, even if maybe leadership agreed if some of the people started to raise a lot of heck about it, then we could have problems with it. We wanted to go in kind of quiet and fast and get this done before actually what ended up happening, which was chaos kind of erupted and they slammed the door shut on amendments. So we wanted it to be noncontroversial, and that was certainly a point that could become controversial.

I am not a lawyer. I studied the Voting Rights Act a little bit in grad school and I knew that 50 percent could be a problematic threshold if we went below that.

And then just as well, you know, morally wanted to, you know, preserve minority voting power in that district.

Q. You talked before instructions you received from Representative Burnam. Was it an instruction or a guideline that you were trying to follow in getting the SSVR down at all?

A. No. The sole instruction were two, were do it with HD99 and bring Como in.

[641] Q. After talking with Mr. Golando, what did you do next with drafting the map?

A. I sent it down to my boss and talked to him about it via phone.

Q. And what information did you share with Representative Burnam?

A. I managed to relay what Mr. Golando said, and then walked through a little bit of what I had done with the mapping.

Q. Did you show the representative -- go ahead.

A. And what the numbers were.

Q. Did you show Representative Burnam any particular demographic information about the plan?

A. We went through a couple of numbers, but the only one I really recall discussing is the SSVR percentage.

Q. At this time did Representative Burnam provide you any additional instructions on drafting or continuing to draft changes to House District 90?

A. Yeah. He said, okay. Go back and see if you can draw a version that does a little more swapping between 90 and 99 that restores the SSVR level back up to the -- to the plan that we were amending.

* * *

[CROSS-EXAMINATION BY MS. PERALES:]

[660] * * * Q. Now, what you did know about the 2011 redistricting of House District 90 was both that the district lost Como and that the district became substantially more Hispanic, correct?

A. That's correct.

Well, I don't know. You have to qualify "substantially."

Q. Do you recall when I took your deposition and I asked you:

"Question: Okay. Do you know whether the Latino population in House District 90 has been increasing over the past decade?

"Answer: Well, it depends on how you define District 90. Obviously, it changed very substantially recently. So I know in the redistricting changes that occurred in 2011 that there was -- that the portion of the population that is [661] Hispanic increased fairly dramatically, and I know we lost Como, and -- and, yeah, that's what I know there."

Is that your testimony?

A. That is my testimony, yes.

Q. I believe this was implicit, but just for the purpose of the record, when you worked on Representative Burnam's amendment maps in 2013 during the special session, you used the Texas legislative council's RedAppl system, correct?

A. That's correct.

Q. Now, following up on your previous testimony regarding when you learned that amendments might be considered in the 2013 special session with respect to the redistricting bill, it's true that you were at first surprised that amendments to the map would be seriously considered, correct?

A. That's correct.

Q. And you worked on your maps in a compressed time period of less than one week, correct?

A. That's correct.

Q. And during that week you testified earlier that you reached out and shared your draft map with Martin Golando of the Mexican American Legislative Caucus, correct?

A. That's correct.

Q. And, in fact, Mr. Golando's feedback to you was he didn't think MALC could support a map that substantially diluted Hispanic voting power in the district, correct?

[662] A. I don't want to be too precise on whether that meant MALC as an organization or whether MALC members. And I don't recall what the case was exactly.

Q. Do you recall when I took your deposition and I asked you:

"Question: And do you remember what he said inresponse with respect to Mr. Golando?"

That you responded:

"Answer: I believe his response was that he didn't think MALC could support a map that substantially diluted Hispanic voting power in the District."

Was that your testimony?

A. Yes.

Q. And it's correct that you did drop off a draft of your map at Representative Geren's office, correct?

A. Of the second map, yes.

Q. H328; is that correct? The second map, 342.

A. I think it might -- the second map.

Q. Okay. The second map?

A. The one that was adopted.

Q. The one that was adopted --

A. Yes.

Q. -- was the one you dropped off at Representative Geren's office?

A. That's correct.

Q. Thank you.

[663] Now, you testified earlier that when you first undertook your mapping exercise in 2013, that your

explicit instruction from Representative Burnam was to bring the neighborhood of Como back into HD90, correct?

A. That's correct.

* * *

Q. Thank you.

And on your first draft you didn't make any other changes other than to bring Como into HD90, correct?

A. I think it's possible I may have kind of randomly kicked some precincts back into 99 if we exceeded the population, but I really don't recall. Nothing with an intended purpose other than meeting the population limits.

Q. And you brought this first draft map to Mr. Burnam and you pointed out to him that bringing in Como had substantially reduced the SSVR below 50 percent, correct?

A. It reduced it by about two points I think, yeah.

Q. Do you recall when I took your deposition I asked you:

"So we were talking about the moment in time when you gave your map to Representative Burnam with a data table. Do [664] you know what he did with the map and the data table after that?

"Answer: I believe my conversation with him was I talked to Marty and they did not like what it did to Hispanic voting age population and -- and I pointed out to him that it did substantially -- that the SSVR did substantially decrease, and particularly that it decreased below 50 percent."

Was that your testimony?

A. Yes.

That wasn't what you asked.

Q. But you did not request or look at any data showing whether the district changed in its election performance because, in your opinion, it is a heavily democratic district and thus, the changes were not of concern to you, correct?

A. That's correct.

Q. And then as you previously testified, Representative Burnam asked you to keep the Como precinct in but to try to raise that Hispanic SSVR, correct?

A. That's correct.

Q. And so you tried in your mind to restore Hispanic voting power to the same level that it was in Plan H309, correct?

A. As defined by SSVR, yes.

* * *

[REDIRECT EXAMINATION BY MR. BITTER:]

[693] * * * Q. Last set of questions.

In response to both questions from Ms. Perales and the Court, you spoke about the limitations from your perspective on where you could swap districts and that you -- it was your perspective you were limited to House District 99; is that correct?

A. That's correct.

Q. As part of that, as part of the basis for your perspective on that, have you had any communications with Representative Geren about that issue?

A. I had not.

Q. Had you had any communications with Representative Geren's office about that issue?

A. No, I had not.

Q. Had you had any communications with Chairman Darby about that issue?

A. I had none.

Q. Had you had any communications with Chairman Darby's staff about that issue?

A. I had none.

[694] Q. Had you had any communications with anyone in the House leadership about the extent to which amendments would be accepted in 2013?

A. No. It was simply scuttlebutt.

Q. Ms. Perales asked you about your recollection of what Mr. Golando told you about the map, and I believe your testimony live and through the deposition was that Mr. Golando indicated that MALC did not support a map that substantially diluted the vote of Latinos, something to that effect. Do you remember that testimony?

A. I do remember that testimony.

Q. Beyond your conversation with Mr. Golando, did you talk to any other individuals affiliated with MALC about the maps that you were preparing?

A. No. And -- well, I did not.

Q. Did you speak to any legislators about the maps that you were creating?

A. No, I did not.

Q. Are you aware that Representative Burnam's floor amendment was adopted?

A. Yes, it was.

Q. Are you aware whether there was a record vote taken on that amendment?

A. There was not.

Q. Are you aware whether any members could have requested a [695] record vote on that amendment?

A. They could have, yes.

Q. And so I just want the record to be clear. At any point in the drafting of any of the maps did you have conversations with any members of the legislature about the changes you were making to House District 90?

A. No, I did not.

Q. Did you have any communications about why you were making those changes?

A. No, I did not.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, ET AL, Plaintiffs,	)	
	)	No. SA:11-CV-360
vs.	)	
	)	San Antonio, Texas
RICK PERRY, ET AL, Defendants.	)	July 17, 2014

VOLUME 4
TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE ORLANDO L. GARCIA, THE HONORABLE XAVIER RODRIGUEZ, UNITED STATES DISTRICT JUDGES, AND THE HONORABLE JERRY E. SMITH, UNITED STATES CIRCUIT JUDGE

[1102] THE WITNESS: Don't do that to me.

JUDGE GARCIA: Okay. We will take a recess. (Brief recess.)

JUDGE GARCIA: You may be seated.

And call your next witness.

MS. McLEOD: Good morning, Your Honor. Michelle McLeod on behalf of the United States. And the plaintiffs are now moving to the Dallas area.

JUDGE GARCIA: Okay.

MS. McLEOD: And our first witness is Michael McPhail.

COURTROOM DEPUTY: Please raise your right hand.

(Oath administered to the witness.)

COURTROOM DEPUTY: Thank you. You may have a seat.

*_*_*_*_*_*_*_*_*

DIRECT EXAMINATION

BY MS. McLEOD:

Q. Good morning, Mr. McPhail. And please state your name for the record.

A. Michael Brendan McPhail.

Q. Thank you, Mr. McPhail. Where do you live?

A. Irving, Texas.

Q. And how long have you lived in Irving, Texas?

A. My entire life.

Q. And where did you attend high school?

[1103] A. Irving High School.

Q. And where did you attend college?

A. North Lake Junior College. I went to a few semesters at the University of Texas at Austin, and then I got my bachelor's degree in finance from Columbia Southern University.

Q. So outside of the semester that you spent at UT Austin, have you always lived in Irving?

A. Yes.

Q. And how long have you resided at your current address in Irving?

A. My entire life.

Q. And in what Texas House district does your home address sit?

A. House District 105.

Q. And what legislator represents House District 105 currently?

A. Linda Harper-Brown.

Q. And can you tell the Court a little bit about your professional background?

A. Yes. Starting in 1999, I went into mortgage banking. I worked for City Financial Mortgage. Well, first as a temp and then as a permanent employee for City Financial Mortgage from about 1999 to 2004. Then from 2004 to 2012, I worked for First -- it was what was called First Horizon Home Loans. It [1104] was bought out by Metlife Insurance in 2008.

After they closed the company in 2012, I held a few different jobs through 2012. One of them was a voter registration project position with a woman by the name of Sharon Barbosa-Crain. One of them was for a political consultant in Dallas doing data entry. And I also worked as the elections coordinator for the Dallas County

Democratic Party in the 2012 election cycle, recruiting and training election day judges and alternate judges.

JUDGE GARCIA: Mr. McPhail, you might want to slow down.

THE WITNESS: I apologize, sir.

BY MS. McLEOD:

Q. And did you hold a position at Wells Fargo Home Mortgage?

A. Yes. In January of 2013, I was hired to be a mortgage underwriter at Wells Fargo Home Mortgage. And as the federal government shutdown took effect, they laid off a third of my office late in 2013, and I was one of the people laid off.

Q. And what are you currently doing?

A. Currently, I am seeking full-time employment and I am volunteering in a variety of groups in my community.

Q. Can you tell us a little bit about the community work that you are doing?

A. Yes. I am a member of a lot of civic associations in Irving, from the Elks Lodge and the Irving Evening Lions Club [1105] to the Irving Democratic Club, League of Women's Voters, Irving, Texas Democratic Women, Friends of the Irving Public Library, Irving Heritage Society.

I also serve on the state Democratic Executive Committee for Senate District 9. I am the committeeman. In that capacity, I basically serve as a liaison between the grass roots and the party structure. The Executive

Committee governs the party between the biennial state conventions.

Q. Are you familiar with the neighborhoods in and around Irving?

A. Yes.

Q. And how did you gain this familiarity?

A. Living there my whole life, working in Irving, going to school in Irving, and also through political volunteering, especially door-to-door block walking, and phone banking.

Q. How many neighborhoods would you say you have block walked in Irving?

A. Just about every – almost every non-gated, non-apartment community in Irving, at one point or another, in the last eight years.

Q. And are you familiar with the racial demographics of the neighborhoods in Irving?

A. Yes.

Q. And how did you gain that familiarity?

A. Growing up in Irving, watching it change over the years; [1106] especially doorknocking, you see people face to face at the doors.

Q. Are you familiar with voter turnout in the precincts in Irving?

A. Yes.

Q. And how did you gain that familiarity?

A. Largely through reviewing election results that are available on the Dallas County Elections Department website.

Q. I would like to pull up an exhibit to show you, U.S. Exhibit 500. And do you recognize this exhibit?

A. Yes.

Q. And could you tell the Court what it is?

A. That was the State House district map for Dallas County that was in effect from 2001 to 2011.

Q. And have you seen this exhibit before today?

A. Yes.

Q. And do you remember when you first saw this map?

A. It would have been probably around 2001, 2002, when the map went into effect.

Q. Okay. And is Exhibit 500 a fair representation of the lines that you saw around 2001, 2002?

A. Yes.

MS. McLEOD: Your Honors, I move to admit United States Exhibit 500 into evidence.

MR. FREDERICK: No objection, Your Honor.

[1107] JUDGE GARCIA: It is in. Thank you.

BY MS. McLEOD:

Q. Mr. McPhail, can you generally describe the configuration of HD 105 on this map?

A. It is generally a compact map encompassing most of Irving north of the Rock Island railroad and west of Loop 12.

Q. And I will pull up Exhibit 501. And do you recognize this exhibit?

A. Yes, I do.

Q. And what is it?

A. That is the House district -- Dallas County State House district map that was adopted by the legislature in 2011.

Q. And have you seen this exhibit before today?

A. Yes.

Q. When was the first time you saw this exhibit?

A. 2011, as it was being debated.

Q. And is Exhibit 501 a fair representation of what you saw in 2011?

A. Yes.

MS. McLEOD: Your Honors, I move to admit U.S. Exhibit 501 into evidence.

MR. FREDERICK: No objection.

JUDGE GARCIA: It is in.

BY MS. McLEOD:

Q. How would you describe the boundary lines of HD 105 in [1108] this plan?

A. They are jagged, bizarrely shaped, and extend much, much farther outward than they used to.

Q. I would like to ask you some specific questions about the neighborhoods in and around Irving in this plan. I am going to pull up a document labeled United States Exhibit 299-A.

Does this map look familiar?

A. Yes.

Q. And can you tell us what it is?

A. It appears to be the 2011 State House district map for Dallas County and the eastern portion of Tarrant County.

Q. Does it look like a similar configuration of District 105 that you saw in a previous map?

A. Yes.

MS. McLEOD: Your Honors, I moved to admit United States Exhibit 299-A into evidence.

MR. FREDERICK: No objection, Your Honor.

JUDGE GARCIA: Admitted.

BY MS. McLEOD:

Q. Can you tell the Court, Mr. McPhail, where Irving ends and Grand Prairie begins?

A. The legal boundary is along Hunter Ferrell Road. The effective boundary between the two communities is along the west fork of the Trinity River.

Q. Okay. I am going to limit my questions to the Irving [1109] portion of District 105.

A. Okay.

Q. So we will start at the top of the district and then work our way down to the Trinity River. First I want to direct your attention to the area at the top of District 105.

A. Up here?

Q. The area just inside the district that runs from Loop 12 to Country Club Road.

A. Okay.

Q. And can you indicate where that area is for the Court?

A. Yes. It is right through here.

Q. And what precincts make up this area?

A. 4636, 4647, 4632, 4633, 4626, 4627, and 4628.

Q. How would you describe the ethnic makeup of this area?

A. This area is very white.

Q. And how would you describe the socioeconomics, the makeup of this area and the homes in this area?

A. Overwhelmingly, this is a wealthy community. The homes tend to be some of the nicest in Irving and the most desirable. When you -- these are typically slab foundations, at least three bedrooms, usually four. It is a very, very nice neighborhood.

Q. Are there any gated communities in this area?

A. Several, actually. This one, at the top of the Y in 4632 and this little southern -- 4636 is --

[1110] THE REPORTER: Hold on. If you will slow down a little bit. The southern --

THE WITNESS: This is Cottonwood Valley gated community. It is very wealthy, very white. Several celebrities live here. A lot of Dallas Cowboys. When Jessi~~c~~a Simpson and Tony Romo lived together, they lived here. Byron Nelson, the golf pro, lived here. In fact, right across MacArthur, at the Four Seasons Golf Resort, that is where – that is why Byron Nelson plays there, because he lives right across the street.

If you look up here, you will notice this is Windsor Ridge gated community. This is the enclave at Las Colinas. Fairway Vista. All of these overlook the golf course, the Four Seasons Golf Resort.

As you move across O'Connor, this empty space is the Las Colinas Country Club. This area is known as Fox Glen. There are actually deed restrictions built into the homes that actually face the golf course that if anybody gets killed by a flying golf ball, the country club does not have any liability. And this is a gated community called University Hills Estates.

Q. Thank you. I would like to stay at the top of District 105, but I want to move to an area that has been excluded from the district.

A. Okay.

[1111] Q. Do you see Precinct 4635 on this map?

A. Yes, I do.

Q. And can you indicate where that is for the Court? Can you tell me about the community that lives in Precinct 4635?

A. There is one very small housing subdivision, middle class houses, but overwhelmingly, most of the housing is large apartment complexes at the north end of the precinct along Meadow Creek Drive. These apartments are lower middle class, not affluent.

Q. What about the racial demographics of the community in those apartments?

A. Racially, they are largely not white. It is very mixed racially.

Q. Okay. And then can you tell us about the area just on the other side of MacArthur there inside District 105 that also runs along Meadow Creek Drive?

A. Yes. The same sort of apartments you see in 4635 are over here. All of these apartments are in the Carrollton-Farmers Branch School District, which has a higher rating than the Irving School District farther south. I've actually had many people tell me on the phone, when I am phone banking, they moved to these apartments solely because they wanted to get their children into the best schools they possibly could.

Q. Do you know any differences between the apartments that are in 4635 and the apartments that are in 4636?

[1112] A. Architecturally, demographically, socioeconomically, they are the same. The only difference is, these apartments are in a precinct with several gated communities. These are not. And these were excluded from House District -- the new House District 105.

Q. Let's move over to Precinct 4630.

A. Okay.

Q. Can you indicate where that is on the map?

A. Yes. It is right here.

Q. And can you tell the Court about the community that lives in Precinct 4630? And just -- I am sorry. Before you begin, is this precinct inside or outside of District 105?

A. Currently, it has been removed from House District 105.

Q. Okay. And can you tell the Court about the community that lives in this precinct?

A. Overwhelmingly, the housing in this area is apartments and they are lower income. The population is distinctly not white, a lot of African-Americans. This is one of the most African-American -- west of the Beltline, this is one of the most African-American communities in the city of Irving. It is -- this area, all of it was originally a freedmen's community founded in the 1850s, one of the oldest in Texas, called Bear Creek. A lot of African-Americans live here. These apartments were built starting in the late 1970s --

MR. FREDERICK: Your Honor, I am going to object to [1113] the narrative.

JUDGE GARCIA: I will sustain that. Go ahead.

BY MS. McLEOD:

Q. Can you tell me about the homes in 4630?

A. These are largely working class apartments.

Q. Okay.

JUDGE SMITH: Could you just -- I am just trying to orient myself. Could you point out like Loop 12 or 183?

THE WITNESS: That is not a problem, sir. 183 is down here.

JUDGE SMITH: Okay.

THE WITNESS: This is -- if you go up through here, this is Loop 12. It is also known as Walton Walker Boulevard.

JUDGE SMITH: Okay.

THE WITNESS: This is State Highway 114.

JUDGE SMITH: Okay.

THE WITNESS: And this is State Highway 161.

JUDGE SMITH: All right. Where is the University of Dallas?

THE WITNESS: The University of Dallas is on the eastern edge of the city right over in here.

JUDGE SMITH: All right. Right next to the old stadium?

THE WITNESS: Correct.

JUDGE SMITH: All right. Thank you.

[1114] BY MS. McLEOD:

Q. Can you tell us about the racial demographics of Precinct 4630?

A. 4630 is very -- largely a nonwhite precinct, very racially diverse, a lot of African-Americans.

Q. All right. And can you tell me, do you know how that African-American community came to live in Precinct 4630?

A. One factor is, there are a lot of Section 8 apartments in this area; as the Dallas Housing Authority settled a racial discrimination suit in the mid 1980s, they moved a lot of residents out of segregated public housing in south Dallas and gave them rental vouchers.

Many of them chose to move over to this area, in part because it was so African-American. As a result, the local elementary school and junior high serving this area, this precinct have the highest concentration of African-American students in the district.

Q. Thank you.

A. This is in the Irving Independent School District, by the way.

Q. All right. Now I would like to ask you some questions about the precincts that have been split between District 105 and neighboring District 103.

A. Uh-huh.

Q. So I want to direct your attention to west Irving, to the [1115] area along Irving Boulevard, that includes portions of Precincts 4610 and 4618.

Can you indicate where that area is in the report?

A. Right in -- excuse me. Right here.

Q. Thank you. And can you tell the Court about the racial demographics of the population that has been split out of Precincts 4610 and 4618?

A. These are very Hispanic neighborhoods.

Q. And can you tell me about the socioeconomics of the community living here?

A. Lower class to working class.

Q. And how would you describe the homes in this area?

A. Most of the housing is in the form of single-family homes. They are working class homes, a lot of two-bed, one-bath. Many of them have carports instead of garages. It is not uncommon to see pier-and-beam foundation, instead of a slab foundation. There are some apartments, particularly in 4610. This area, actually, has a -- oh, it is working class apartments.

Q. Now, are the single-family homes that you mentioned there, are they largely rental homes or owner-occupied?

A. Largely rental, nowadays.

(Change of reporters.)

--*-*-*-*-*-*-*

[1116] *****(Change of reporter.)*****

BY MS. McLEOD:

Q. How would you describe the businesses in this area?

A. There's a Home Depot, home improvement store at this little corner, and the apartments right along side there -- it -- frequently in the morning, when general contractors buy their supplies and leave, there are large crowds of Hispanic men standing in the front yards of the apartment complex waiting to get hired as day laborers.

The current mayor has previously called on the City to pass a vagrancy ordinance --

MR. FREDERICK: I'm going to object to this narrative.

JUDGE GARCIA: I'll sustain that.

Why don't you move on.

BY MS. McLEOD:

Q. The McClain -- McClinin (*phonetic*) Park Shopping Center also in this area?

A. Yes, it's down here at this intersection (*indicating*). Many of the stores there -- the large national chain stores have left. What you see now is locally owned stores. Many of them have Spanish names and Spanish language signs in the windows.

Q. All right. Thank you.

Let's continue down Urban Boulevard and discuss the precinct splits in 4611 and 4612. Can you indicate where that area is, please.

[1117] A. Yes. It's here, and up through here (*indicating*).

Q. Now, can you tell us about the racial demographics of a population that is -- that is -- that has been split out of Precincts 4611 and 4612.

A. And these are very Hispanic precincts.

Q. And what about socioeconomic makeup of this area?

A. Working class largely.

Q. What about the homes in this area?

A. The homes are working class to lower middle class homes. Some of them do have slab foundations and three-bedroom, two bath. Many of them though are still smaller, that many of them still have carports instead of garages and are still working-class homes, two bed, one bath.

Q. Okay. And can you tell me about the businesses here?

A. Especially along Urban Boulevard, these businesses are largely not national chain stores. You see a payday lenders, check cashing parlors, car title lenders, tattoo parlors, some Hispanic store-front churches with -- that are evangelical churches. No national chain stores to speak of.

Q. Let's move over to Precinct 4606 and 4607. Can you indicate the portion that has split out of Precinct 4606 and then Precinct 4607?

A. Okay. And this is 4606, and 4607 (*indicating*).

Q. And let's just start with 4606. Can you tell me about the racial demographics of that small sliver that's been split out?

[1118] A. It is a Hispanic neighborhood.

Q. And what about the socioeconomic makeup of this neighborhood?

A. Lower class to working class.

Q. And what about the homes in that area?

A. At the tip, there's a large apartment complex that is very rundown, not seen as a desirable place to live. The remaining streets have small cottages, two -- but largely two bed, one bath, carports, pier and beam foundations.

Q. And are those cottages rentals or owner occupied?

A. Disproportionately rental nowadays I would say.

Q. Now, what kind of businesses would you find in this area?

A. Along Urban Boulevard, a few national chain stores, if any, a lot of smaller family-owned stores, many of which have Spanish language names, Spanish language signs in the windows. You can see a lot of pawnshops, car dealerships -- used car dealerships, car repair shops, payday lenders, check cashing parlors, title lending stores, rent-a-tire stores, many of which explicitly appeal to a Hispanic clientele.

Q. And what about the racial demographic of Precinct 4607 that you indicated previously?

A. This is a largely, nowadays, Hispanic precinct.

Q. And what about the socioeconomics of the -- of the residents there?

A. Overall, I would say it's largely a working-class precinct.

[1119] Q. And the homes in this area?

A. Not seen -- largely, not seen as a desirable place to live. The homes in the western end tend to be -- there are quite a few working-class apartments, some smaller middle -- lower middle class homes. And towards the eastern end, you see more traditional cottages, again, two bed, one bath, carports, a lot of pier and beam foundations.

Q. Now, I would like to discuss the racial demographics of a population that's been split out of 4614 and 4615. Can you indicate that area for the Court.

A. Yes (*indicating*).

Q. And can you tell us about racial demographics of the population in there?

A. This is a very Hispanic neighborhood.

Q. And what about the socioeconomics of the community here?

A. Lower class to working class.

Q. And what about the homes -- what kind of homes would you see there?

A. These homes tend to be smaller, not very well kept, usually two bed, one bath, smaller homes, again, carports instead of garages.

Q. And what kind of businesses do you see in this area above Urban -- Urban Boulevard?

A. Above Urban Boulevard, along here you would see there's a shopping center on O'Connor towards Pioneer, a little bit [1120] farther south (*indicating*). This area is old mom-and-pop shops, car insurance shops that have Spanish language names. You – almost all of the stores have Spanish language signs in the windows and that sort of thing.

Q. And we're going to move over just a bit east to Precinct 4616 and 4620.

A. Okay.

Q. Can you indicate where those areas are for the Court?

A. Yes (*indicating*).

Q. And can you tell me about the racial demographics of the population splits out of these precincts?

A. These -- another very Hispanic area.

Q. And what at the socioeconomic makeup of this area?

A. Lower class to working class.

Q. And the homes, what kind of homes would you see here?

A. Smaller cottage-type homes for the most part, usually two bed, one bath. Some of the them do have garages, but they're just not desirable places to live.

Q. And what about the businesses, what kind of businesses would you find here?

A. Again, you can see no national chain stores. These are locally owned mom-and-pop shops. You see some supermarkets that are -- now have Spanish language names, Spanish language signs, Hispanic-oriented meat markets. You see, up on the highway, check cashing parlors, car lots, that sort of thing, [1121] and not really that much retail left in this part of town.

Q. Is there a railroad in this area?

A. Yes. This -- this actually is a railroad that goes all the way up. There is a tremendous amount of noise from the railroad going through here. And, actually, railroad track itself is at ground level, and the crossroads, like Union Bower, it's very difficult to get across at certain times of

day because the -- and you just can't because the train is parked there which makes it really difficult to get from one part of town to the other.

Q. Now, I would like to discuss Precinct 4608. Now, can you indicate the entire precinct?

A. (*Indicating*).

Q. Okay. Now can you indicate the portion that's been split out of Precinct 4608?

A. (*Indicating*).

Q. And can you tell us about the racial demographics of that portion?

A. That's a very Hispanic neighborhood.

Q. Okay. And what about the -- what kind of -- I'm sorry, the socioeconomics makeup of that community?

A. Working class.

Q. All right. And the homes there?

A. Not very nice. They tend to be smaller, close to one another. A lot of times these streets don't have sidewalks. [1122] It's just a working-class neighborhood.

Q. All right. And any businesses there?

A. Right along Loop 12 there are some. You see, like, a Motel 6, a Waffle House, a Whataburger, some check cashing parlors, a car stereo store.

Q. Okay.

A. No national chain stores really.

Q. Thank you.

Now, I want to discuss the portion of Precinct 4608 that remains in District 105, and I want to first discuss -- and we're just going to break it up in parts and talk about the portion of the precinct north of 183. Can you indicate where that is?

A. (*Indicating*).

Q. All right. And can you tell me -- can you tell the Court what is in this area?

A. This area is largely currently industrial property. This was the old Texas Stadium site until it was imploded about five years ago. This is a truck yard, a car dealership, this is some office parks.

Q. Has there been discussion about redevelopment in this area?

A. Yes, the city council has entered into negotiations with a developer to bring luxury, upscale condominiums, high-rise condominiums, and office towers to the Texas Stadium site, and they might include a professional tennis team to be played [1123] here. Now --

Q. And --

A. Oh, go ahead.

Q. Now, I want to talk about the portion that's south of 183. Can you tell the Court what's in this area?

A. Around in here you see a -- it's a real mix. You see some industrial properties, some offices. There are actually some very nice middle class homes through here, some of which are on rather large lots, pretty stone exteriors of the homes. Some of them have their own wells. They have

garages. They're on slab foundations. And, as you move farther to the east, this area (*indicating*) -- now it contains what's called Campion Trails. It's part of the Dallas County Trail System, which leads in from Valley Ranch and Las Colinas up north, now, very recently, through here (*indicating*).

As you go down to this end, this is Trinity View Park. It's actually on both sides of Urban Boulevard, which runs along here (*indicating*). There's a lot of athletic fields for soccer, football, and which this park was -- used to be viewed as being kind of a dump because it was so far off from the rest of the city. Now that it's linked to Campion Trails, which have paved bike lanes where you can ride bicycles, jog, roller blade, skateboard, ride horses. It's now -- now actually being looked at in a much more favorable way --

JUDGE GARCIA: In any event, ask another question.

[1124] MR. McLEOD: All right. Let's move over to Precinct 4603 and can you indicate what 4603 is?

A. Yes (*indicating*).

Q. And can you discuss the racial demographics of the portions that have been split out of Precinct 4603?

A. This is a very Hispanic area.

Q. And can you tell us about the homes in this area?

A. Very few single-family homes are right on the southern edge of Shady Grove. There are some along River View Drive, some very rundown apartments.

Q. All right. And what about the socioeconomics of this area?

A. This is a poor precinct.

Q. Now, what about the -- the -- the other area, the second area of 4603?

A. This area here (*indicating*).

Q. I'm sorry. 4604. I'm sorry. Can you indicate what 4604 is?

A. 4604 is right through here (*indicating*).

Q. Okay. Now, can you discuss the areas that have been split out of Precinct 4604?

A. No, this was split out of 4602 actually --

Q. I'm sorry. 4602. Thank you.

A. The other part of 4602 that was split out was split out up here (*indicating*). This part is largely floodplain along the Trinity River. There is a -- in the last several years there [1125] has been some redevelopment through here. This is the one street with middle-class houses on it (*indicating*). The people -- they are slab foundations, three – three bed, two bath --

Q. Okay.

A. -- that sort of thing.

Q. Thank you.

Are there any businesses in this area?

A. No, not yet anyway.

Q. Now, I want to discuss Precinct 4601. Can you indicate

where that is for the Court?

A. 4601 is here (*indicating*).

Q. Okay. Now, how would you describe the racial demographics of the portion of 4601 that remains in the district?

A. This is largely white. It's becoming more Hispanic, but it is still pretty white.

Q. Okay. And how would you describe the homes here?

A. Very nice. This is solidly middle-class precinct, three bed, two bath. I don't think there are any homes that are actually on pier and beam foundations. Here they all have garages. This is Lake Vilbig, a man-made lake that was built in the 1980s. There's some very nice upper middle-class homes along through here (*indicating*).

Q. All right. And how would you describe the businesses, if any, in this area?

[1126] A. Along this area, mostly along Story and Shady Grove, some shopping centers. The stores, almost exclusively, have names in English. The signs in the windows are printed in English. You see no Hispanic-oriented meat market or supermarkets, that sort of thing.

Q. Now, can you indicate the portion of this precinct that has been split out for the Court?

A. Right here (*indicating*).

MS. McLEOD: And if we could zoom in, Tim, please, pull out 200. Okay. And then just move the map a little more.

Thank you.

BY McLEOD:

Q. Can you indicate again, Mr. McPhail.

A. Right through here (*indicating*).

Q. And can you tell us where -- about the racial demographics of the communities living in that --

A. It's highly --

Q. -- precinct --

A. -- Hispanic.

Q. And what about the homes there?

A. This si actually a -- one manufactured home park.

Q. Okay. And any businesses in this area?

A. No, it's just a park itself.

Q. All right. Thank you, Mr. McPhail. That's all the questions I have. I pass the witness.

[1127] MR. FREDERICK: May it please the Court.

CROSS-EXAMINATION

BY MR. FREDERICK:

Q. Good morning, Mr. McPhail.

A. Good morning.

Q. My name is Matthew Frederick I represent the State defendants in this case. I have just a few questions for you.

First, you are currently a member of the State Democratic Executive Committee; is that correct?

A. That is correct.

Q. And, specifically, you're the Male State Democratic Executive Committee Member for Senate District 9 --

A. That is --

Q. -- is that correct?

A. -- correct.

Q. So it's accurate to say then that you were part of the leadership of the Texas Democratic Party; correct?

A. I suppose.

Q. Okay. And you're currently running for reelection; is that right?

A. No, I was reelected last June at the convention.

Q. Oh, congratulations.

A. Thank you.

Q. Now, is it true on your -- you had reelection Facebook page on the internet; is that --

[1128] A. That's true.

Q. -- correct?

And on that page you had a quote that said, I pledge to continue our efforts to strengthen the Texas Democratic Party to win in 2014, 2016; do you recall that?

A. Yes.

Q. You're also Precinct Chair to Dallas County Democratic Party; is that right?

A. That is true.

Q. And, obviously, you've been asked to testify in this case by the Department of Justice; right?

A. Yes.

Q. Let's talk a little bit about the 2011 House Redistricting Plan. You don't have any information about the enactment, development, or history of the 2011 House Redistricting Plan. You only have information about the effect of the plan is that --

A. Yes.

Q. -- right?

And any knowledge about the effect of the plan is limited to Dallas County; right?

A. By and large, yes.

Q. You don't have any information about the methods that were used to create the 2011 House Plan; do you?

A. That is correct.

[1129] Q. Okay. And because you don't have any information about the enactment, development, or history of the 2011 House Redistricting Plan, you can't say who was involved in drawing the boundaries of any of the districts you have been talking about, 103, 104, or 105 --

A. That's correct.

Q. -- can you?

And you don't know why any member of the legislature voted for the 2011 House Plan, but you think the Republicans wanted to have as many house seats as they could; right?

A. Yes.

Q. And as someone in the State Democratic Party leadership who has pledged to strengthen the Texas Democratic Party to win in 2014 and 2016, you have a vested interest in creating more Democratic house districts in Dallas County; don't you?

A. I have a vested interest in making sure African Americans and Hispanics can vote fairly in fairly drawn districts. The party that benefits is the party that benefits.

Q. I appreciate that.

My question is: You have a vested interest in creating more Democratic house districts in Dallas County, don't you, because you're a member of the state party leadership?

A. I would like to see more districts created for the party, yes.

Q. Thank you.

[1130] MR. FREDERICK: No further questions.

JUDGE GARCIA: Anything else?

MS. McLEOD: No.

JUDGE GARCIA: Okay. Thank you, sir. You're excused.

THE WITNESS: Thank you.

(Witness excused.)

TEXAS HOUSE OF REPRESENTATIVES
PUBLIC HEARING
COMMITTEE: REDISTRICTING, SELECT
WEDNESDAY, JUNE 12, 2013
UNIVERSITY OF HOUSTON
Michael J. Cemo Hall, Room 100D
4800 Calhoun Road
Houston, Texas 77004

* * *

[6] argument for identifying the deficiency and how to fix it.

Today we will be hearing all bills that have been referred to this select Committee.

I would like to welcome Mr. Jeff Archer with the Legislative Council, who is a resource witness.

Jeff, would you please come forward and indicate to the Committee the resources that will be available through the Legislative Council.

REPRESENTATIVE THOMPSON: Mr. Chairman, will he be able to offer what the Supreme Court's rulings were and the other courts' were germane to our task on this Committee?

REPRESENTATIVE DARBY: Will Jeff be able to do that?

REPRESENTATIVE THOMPSON: Yes.

MR. ARCHER: I can give a little context, I guess.

REPRESENTATIVE DARBY: Go ahead, Jeff.

MR. ARCHER: A quorum is present, obviously.

My name is Jeff Archer. I'm chief legislative counsel at the Texas Legislative Council. This is the third decade I have been involved in redistricting to one extent or another.

And I'm happy to take any questions. I'm [7] not prepared to discuss the validity of anybody's plan or the legal ramifications in public. Be glad to talk to anybody confidentially. We have to be concerned about waiving any privileges of the Committee and individual members but I will be glad to discuss any procedural or related developments.

As you know, I won't belabor it but the Council provides the computer support in your offices and we provide statistical analyses, multiple reports, both election and voter data, as well as census and census related data, citizenship data and so on.

And if anybody has any concerns or needs any special services in the next 48 hours to make your deadline, let us know.

I'm getting a little feedback here.

How we got where we are, I think very briefly just to sort of provide some background both for -- for witnesses and attendees and for our collective consciousness, the Legislature drew plans following the release of the census in 2011, House, Senate and Congressional plans.

As is often the cases, multiple challenges were filed in Federal Courts around the State of Texas. Those ended up consolidating in a single case for each of the plans in

the Western District of Texas in San [8] Antonio, and we'll call that the San Antonio court.

The challenges there include constitutional challenges. In some cases, some of those challenges are very minute, related to how prisoners were counted and some one person, one vote issues but the predominant challenges were under the federal Voting Rights Act Section 2, which prohibits minority vote dilution, and under the 14th and 15th amendments, which prohibit insidious or intentional discrimination that affects the right to vote.

So, the Court took evidence, took depositions, took evidence, had some hearings on – I think most but not all of the evidence has been, I think, as far as the Court is concerned, regarding those enacted plans. Trials were held in the fall of 2011.

In the meantime, because Texas is covered by Section 5 of the Voting Rights Act, the plans that the Legislature enacted were not legally effective. They could not be put into effect without preclearance from either the Department of Justice Voting Rights Section or the DC Court in Washington, which is required by Section 5.

That put the Federal Court in San Antonio in a quandary because the filing deadline for candidacy is in December and time is of the essence.

[9] The State of Texas, through its Attorney General, submitted and filed preclearance actions in the DC Court in Washington and, of course, those cases were far from being resolved to final, so that we had essentially unprecleared, unenforceable legislatively enacted plans.

So, the San Antonio Court, in an effort to carry out the 2012 elections under a plan of some sort, following various precedence as they interpreted them, independently drew congressional legislative redistricting plans, three plans for the House, Senate and Congressional delegation based on traditional redistricting principles and general principles of Texas practice, such as the county line rule, which in the House of Representatives and the state Constitution says you split counties only as strictly necessary to even out populations.

So, given that background, the Court drew three plans. They heard the evidence in the case. They drew three plans, attempting to address the most serious voting rights issues. They had not made final determinations. They hadn't fully analyzed all the evidence. I don't know that all the rounds of briefing were even in but with respect to moving forward on an interim temporary plan, the Court drew plans in, I [10] believe, December of that year.

The Texas Attorney General took issue with those plans and made a direct appeal to the U.S. Supreme Court regarding the interim plans under the theory that they did not give deference to the enacted plans sufficiently.

The case law was a little unsettled on this particular issue. You had some cases, including the Supreme Court precedent, that indicated the parts of the plan that weren't precleared could not be put into effect but the facts of those cases were -- for example, an older Texas case which the plan had received a specific objection for one location but the rest of the plan the Justice Department had approved by not objecting. They couldn't put the whole plan into effect but at least the Court in that

case knew that part of the plan was not precleared and couldn't give it any deference.

So, the District Court in San Antonio made a best guess as to what the law was with respect to unprecleared plans, and the Supreme Court said they erred by not giving sufficient deference to the legislatively enacted plans.

So, in February of 2012, the Supreme Court issued an opinion directed to the Court in San Antonio, [11] asking it to go back to the drawing board, in other words, and balance the legislatively enacted plans with the legal requirements of the Voting Rights Act.

And that's a little bit tricky because the Court had not made final determinations, as I said, had not made fact findings on every issue, had not thoroughly analyzed all the evidence but they had to make some best case guesses based on the direction that the U.S. Supreme Court gave them.

So, they had to look at the likelihood of success of the plaintiffs challenging the plans on Voting Rights Act grounds and also consider generally what parts of the plan would preclear.

And the Court gave them essentially -- I would call it a balancing test between the legislatively enacted plans and remedying voting rights violations that were -- had some likelihood of success.

And so, the Court drew a second plan in which -- an example, from the House of Representatives, I believe about 122 districts were the same as in the legislative plans.

So, they started with the legislatively enacted plans in all three cases and addressed voting rights violations again on an interim and impromptu basis almost, as if to say this is the best we can do [12] now. We haven't got to the bottom of things.

And I'll get quote from the Court's opinion. This is the District Court when they put their plans together following the Supreme Court directive. They said:· This is not a final ruling.· These are preliminary determinations on the merits of Section 2. We're only looking at preclearance claims that are, quote, not insubstantial. In other words, they disclaimed making final determinations under the Voting Rights Act claims that the plaintiffs had brought.

And they said these are difficult and unsettled legal issues, there are numerous factual disputes and essentially made it explicitly clear that this was an interim plan to address basically first impression of voting rights issues.

And as you know, the elections were postponed, held in the summer of 2012, and those plans currently in effect because of the Court order and the bills that have been filed, Senate and House Bills 1, 2, 3 and 4, propose the Legislature adopting those second round of Court ordered plans that the Court put into effect for the 2012 elections. So, that's how we got where we are today.

REPRESENTATIVE DARBY: Members, any questions?

[13] REPRESENTATIVE VILLALBA: I have a few questions.

REPRESENTATIVE DARBY: Representative Villalba.

REPRESENTATIVE VILLALBA: Thank you, Jeff, for your testimony. That's very helpful.

In the very first meeting we had, I had asked a number of questions around that, and that was the synopsis I was looking for and the timing.

A couple of things I want to address just quickly and to hear from you. You looked to the – talking about the interim plan as an interim plan, the Court said this was an interim plan, it's not final. What additional information will a Court need, it could be that Court or another Court, enable to find what they need to get to a final plan? What more do they need?

MR. ARCHER: That's an excellent question. I can give you some examples, I think, as a way of being helpful.

When the Court said there are unsettled legal issues, I think that means they did not feel they had had time to research and make determinations on some of the issues, such as when is a coalition of minority voters protected creating a protected district or a district that the Legislature is required to consider [14] under the Voting Rights Act given voting behavior and populations and other variables, such as block voting by other voters, particularly Anglo voters in the vicinity, making those determinations as very specific fact finding region by region, looking at reports that expert witnesses have submitted, fairly extensive, and battling expert testimony.

And to make the fact finding you've got to make, you really need to talk about it amongst yourselves, have your

briefing staff be in very confident ground because you're subject to an appeal and you don't want to get it wrong. Those are difficult fact finding determinations as well -- excuse me -- as somewhat uncertain legal determinations.

The Fifth Circuit --

REPRESENTATIVE MARTINEZ FISCHER: I want to follow up on that point.

Jeff, couldn't it also be that at the time that the District Court in San Antonio drew an interim plan, they did not have a ruling of the District Court of the District of Columbia and, in fact, the trial perhaps had not even been concluded?

MR. ARCHER: Absolutely. Obviously, the other large factor is if the -- if the District Court for the District of Columbia in the Section 5 [15] preclearance litigation were to uphold or object to the limited parts of the district, that may change the ultimate determination.

REPRESENTATIVE MARTINEZ FISCHER: Isn't it true on this particular point -- and then I'll give it back to Representative Villalba but on this particular point, the District Court in San Antonio was not allowed, in fact, they were prohibited from making Section 5 determinations because the exclusive jurisdiction that was going to make those determinations was the Department of Justice or the District Court for the District of Columbia? That's also true?

MR. ARCHER: That's correct. And I think the Supreme Court put them in a tough place because they cited the laws that the Court case was stating. District Courts don't

have any jurisdiction to make Section 5 determinations and yet they told them to consider Section 5.

REPRESENTATIVE MARTINEZ FISCHER:· I'm sorry, you actually begged another question.· That's not the imposition of the District Court in San Antonio, that was the direction of the choice of litigation because bear in mind, very few pre -- very few coverage issues sue the United States of America. Most of them preclear through the DOJ.· So, in fact, I believe this was one of [16] the rare instances where there was a challenge by way of declaratory judgment, which, in fact, made this case a much longer situation, would you concede that?

MR. ARCHER: I think that's a fair comment.

REPRESENTATIVE MARTINEZ FISCHER: Thank you.

REPRESENTATIVE VILLALBA: One of the questions that has come up over and over in our testimony is if we adopt interim plans in their current state, and now you've described for us that at least the Court perceives there's additional work to be done, what is essentially the effect of doing that?

As a body, we adopt interim plans and, therefore, we give this plan the imprimatur of the people, right?· We're the people's House and the Legislature will act and speak.· If we do that and adopt these and, again, just hypothetically without any change whatsoever, it sounds to me like there's going to be at least a delta between where the interim maps are and what needs to be completed work-wise and fact finding-wise to get them to where they would be in consonance with the existing

holdings of the Supreme Court or the District Court. So, what is the legal effect or impact of doing that?

Do we -- since we -- if we did that as a body, are we blessing those and somehow by having done [17] that, are we advancing the ball or is there still work to be done?

MR. ARCHER: Well, I'll start saying that opinions differ greatly on that, particularly that the -- the parties to the litigation and proponents and opponents of various elements of the plans.

I think it's clear that legislative enactment of the plan gives it imprimatur of state law, and as a purely legal matter, what that does -- remember in redistricting and other policy areas, the federal courts don't really want to be in the position of deciding how the school system is run or those kinds of things. They don't really want to be in a position of drawing representative districts.

And so, by enacting this plan or any other plan, to some extent, the Court will give greater deference to the elements of that plan than perhaps it would give to its own plan.

That doesn't mean that the parts of the plan that it ultimately finds deficient are any better because the Legislature adopted them. It does two things and I think in an obvious sense. It puts some of the issues behind the state, that is, the districts that the Court found were likely to be violations of Section 2 and, therefore, redrew, that issue is off the table. [18] No more evidence is necessary for -- necessarily for those issues. You're starting from a different place.

But with respect to all the unaddressed issues and second guessing the Court's own determinations, you have -- you haven't removed legal challenges to any of the plan on a -- on a realistic level, that is --

REPRESENTATIVE VILLALBA: Let me qualify my hypothetical. So, if we each were to adopt the interim maps with changes, that would at least address the concerns expressed by the Court in their opinions, while I recognize that that doesn't, of course, eliminate any particular challenge, you might -- and this is a question for you -- will it insulate or inoculate the maps from -- from concerns that they are not somehow adequate to -- to meet constitutional standards?

MR. ARCHER: I don't -- I don't -- I think in no way would it inoculate the plans. What it would do is give the Court a new baseline from which to work if it makes additional remedial changes, that the issues that have been resolved in the map and that the parties to the case don't make stronger cases or argue are still violations are going to stay in place because the deference that's shown but I don't think it prevents anybody in the case or any subsequent litigant because [19] once you have new districts, the Court is more likely, I assume, to accept intervenors who are raising additional issues based on a new map. I'm not sure there's anybody left to intervene but to the extent that there's a citizen group or an effected citizen who can make a good case.

But I think that challenges to both the Court drawn fixes as well as to the background districts that were not changed in any of the plans will go forward, and the Court, I think, is going to have a tricky job balancing psychologically, if nothing else, its own work. To judge

your own work is difficult. Courts do it all the time. On a remand, they do it all the time. They've already done it once in this case. So, they will be faced with the same thing, that the parties to the case will continue to press issues that the Court took a tab at perhaps but didn't fix.

REPRESENTATIVE VILLALBA: Thank you.

REPRESENTATIVE DARBY: Representatives, any other questions?

The Chair will recognize that Representative Keffer is now present.

The Chair will also recognize that Representative Alma Allen is with us this afternoon.

And Representative Harold Dutton behind me.

* * *

[200] STATE OF TEXAS *
COUNTY OF HARRIS *

I, the undersigned certified shorthand reporter and notary public in and for the State of Texas, certify that the facts stated in the foregoing pages are true and correct.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this hearing was taken and, further, that I am not a relative or employee of any counsel employed by the parties hereto, or financially interested in the action.

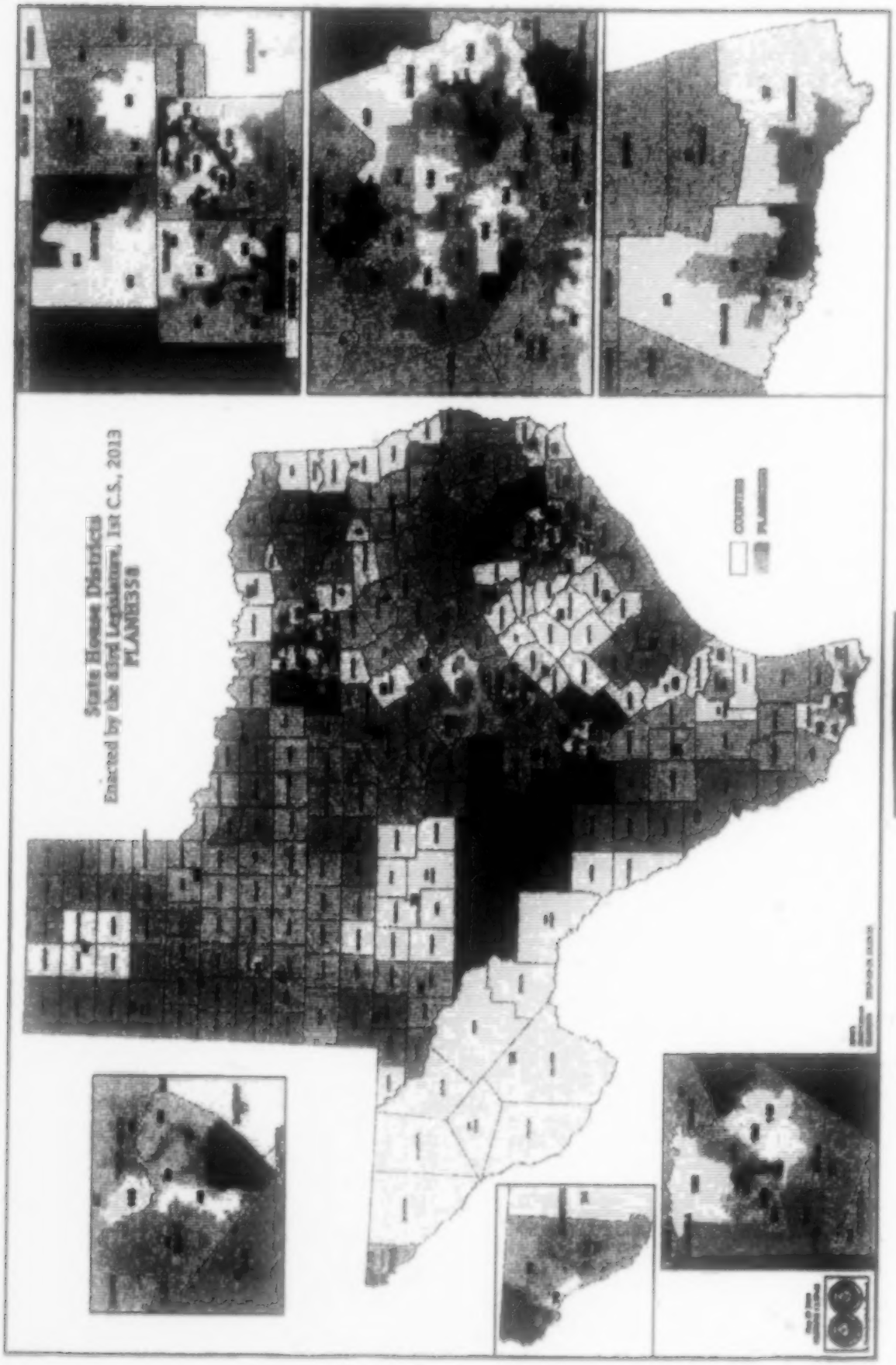
SUBSCRIBED AND SWORN TO under my hand and seal of office on this the 14th day of June, 2013.

[redacted]

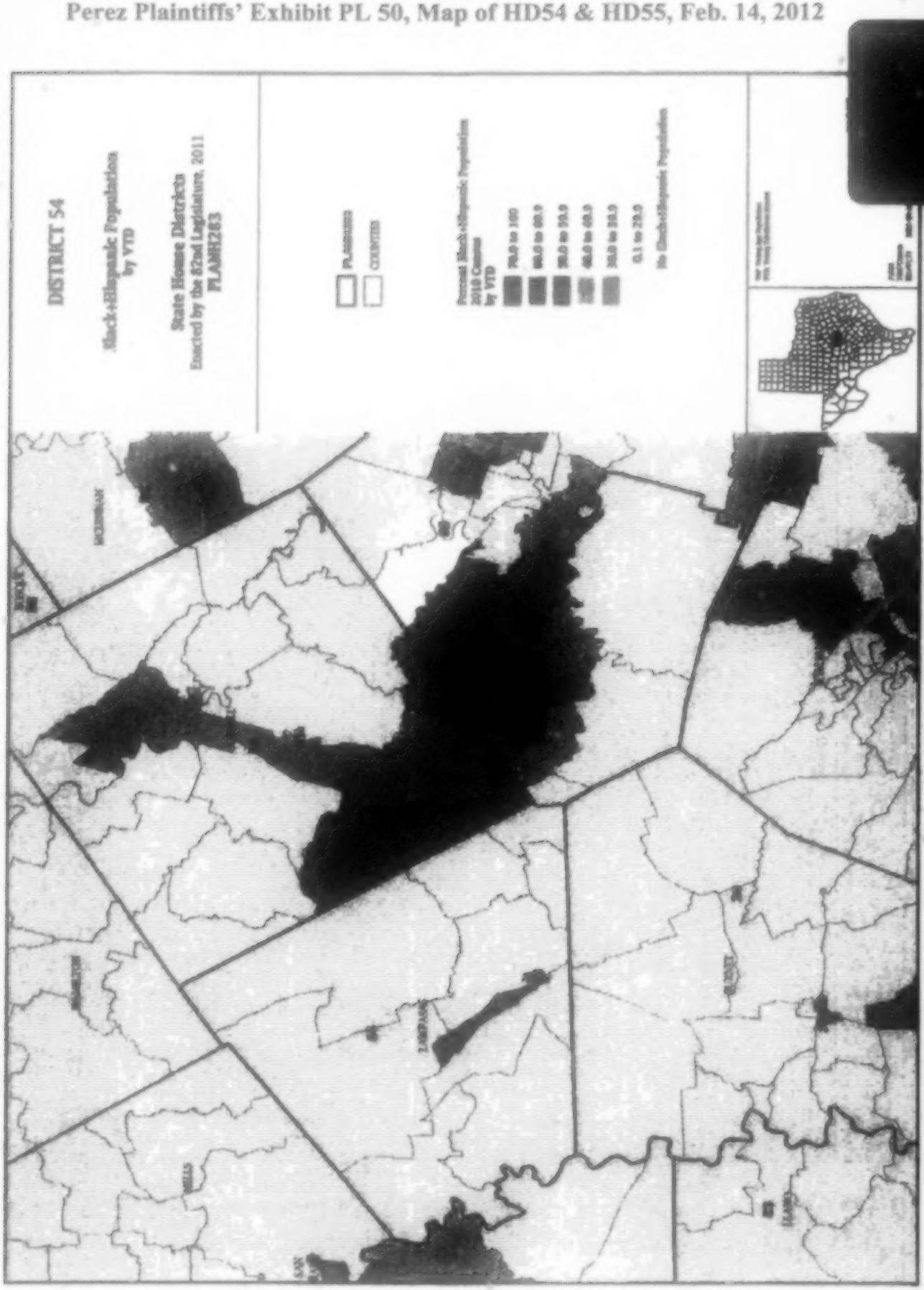
EDITH A. BOGGS, CSR
Certified Shorthand Reporter and
Notary Public in and for
the State of Texas

Notary Expires:· 5-10-2016
Certificate No. 3022
Expiration date:· 12-31-2013
Esquire Deposition Solutions, LLC
Registration No.

Statewide Map, Plan H358, JX-106.1

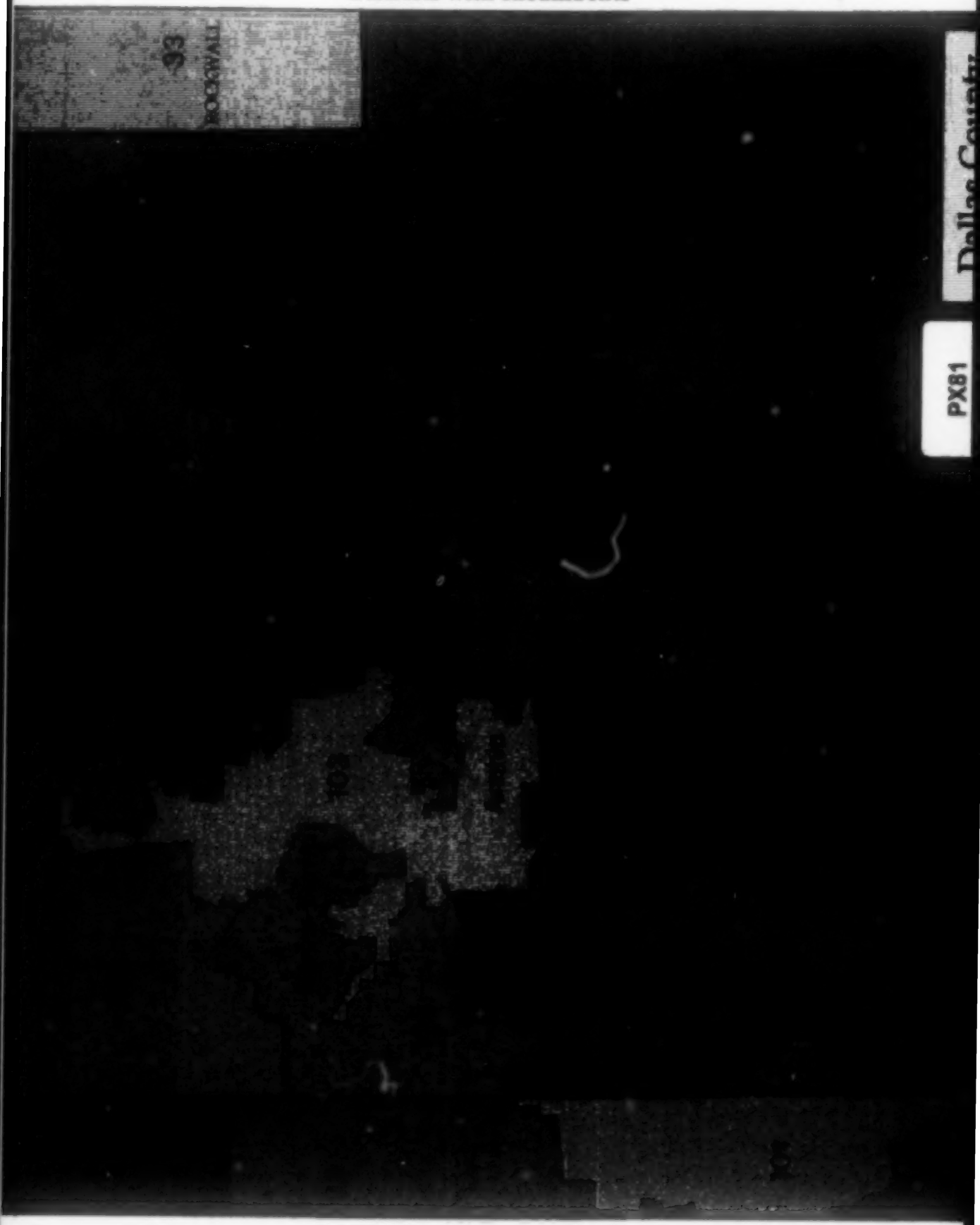


Perez Plaintiffs' Exhibit PL 50, Map of HD54 & HD55, Feb. 14, 2012



NAACP Exhibit 29, Map of HD54 & HD55, Plan H358

Defendants' Exhibit D-150, Map of Dallas County State-House Districts with Incumbents

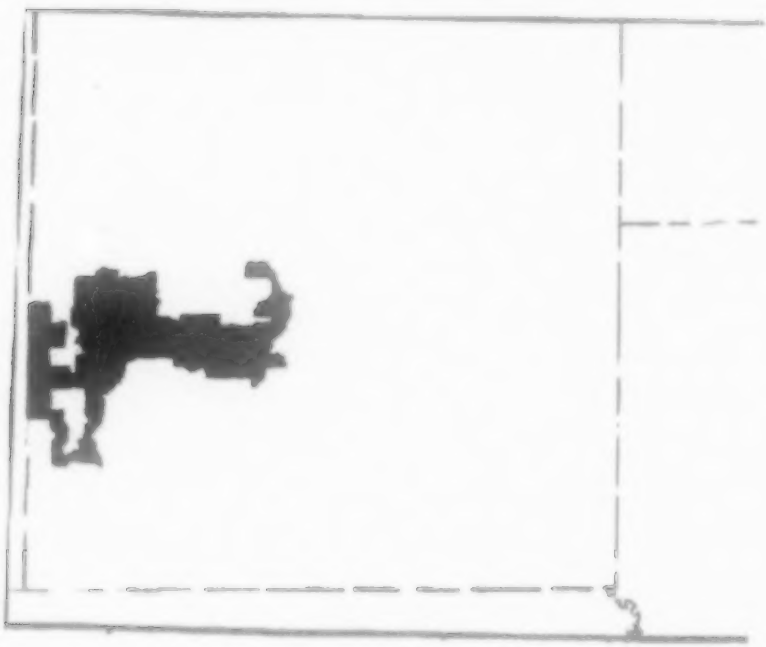


MALC EXHIBITS 41-42, MAPS OF HD104, HD105

PLAINTIFF MEXICAN AMERICAN LEGISLATIVE CAUCUS (MALC) EXHIBIT LIST

41. Figure: Packing of Latino population, District 104

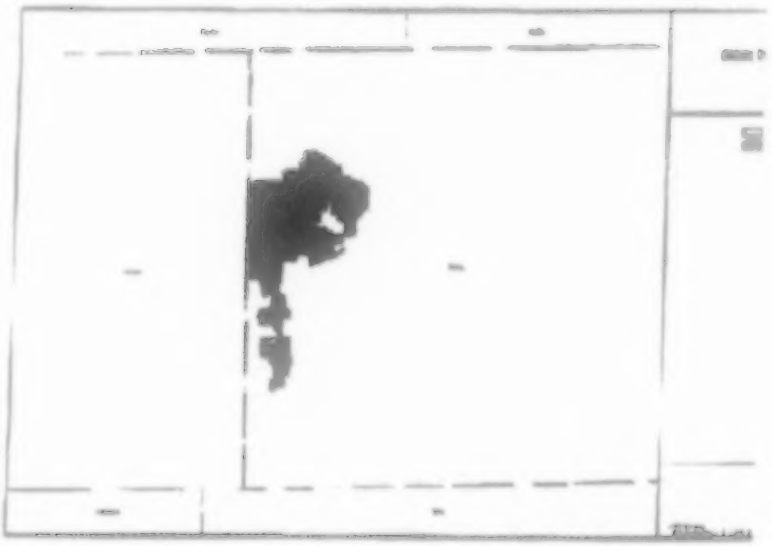
Figure 10: Packing Latinos into One District, Minimizing them in Another in Dallas
A. State House District 104



PLAINTIFF MEXICAN AMERICAN LEGISLATIVE CAUCUS (MALC) EXHIBIT LIST

42. Figure: District 105 missing sliver

Figure 10 B: District 105, the Missing Sliver in District 104



RODRIGUEZ EXHIBIT 912, REPORT OF STEPHEN ANSOLABEHERE, FEB. 26, 2014

EXPERT REPORT

STEPHEN ANSOLABEHERE

February 26, 2014

I. Statement of Inquiry

1. I have been asked to examine minority representation in the Congressional Districts in the State of Texas under Plans C100, C220, and C235. I have been asked to examine racial composition of districts, especially Citizen Voting Age Population, and voting patterns in districts, especially the degree of racial group cohesion and polarization. I have been asked to examine the configuration of and voting in districts in the South and Southwest parts of the state. I have also been asked to examine the division of Travis County under Plans C235 and C100 and the division of Plan C100's CD 25.

II. Background and Qualifications

2. I am a professor of Government in the Department of Government at Harvard University in Cambridge, MA. Formerly, I was an Assistant Professor at the University of California, Los Angeles, and I was Professor of Political Science at the Massachusetts Institute of Technology, where I held the Elting R. Morison Chair and served as Associate Head of the Department of Political Science.

I directed the Caltech/MIT Voting Technology Project from its inception in 2000 through 2004, am the Principal Investigator of the Cooperative Congressional Election Study, a survey research consortium of over 250 faculty and student researchers at more than 50 universities, and serve on the Board of Overseers of the American National Election Study. I am a consultant to CBS News' Election Night Decision Desk. I am a member of the American Academy of Arts and Sciences (inducted in 2007).

3. I have worked as a consultant to the Brennan Center in the case of *McConnell v. FEC*, 540 US 93 (2003). I have testified before the U.S. Senate Committee on Rules, the U.S. Senate Committee on Commerce, the U.S. House Committee on Science, Space, and Technology, the U.S. House Committee on House Administration, and the Congressional Black Caucus on matters of election administration in the United States. I filed an amicus brief with Professors Nathaniel Persily and Charles Stewart on behalf of neither party to the U.S. Supreme Court in the case of *Northwest Austin Municipal Utility District Number One v. Holder*, 557 US 193 (2009). I am consultant for the Rodriguez plaintiffs in *Perez v. Perry*, currently before the District Court in the Western District of Texas (No. 5:11-cv-00360 W. D. Tex), and the Gonzales intervenors in *State of Texas v. United States* before the Federal District Court in the District of Columbia (No. 1:11-cv-01303); I consulted for the Department of Justice in *State of Texas v. Holder*, before the Federal District Court in the District of Columbia (No. 1:12-cv-00128); I consulted for the Guy plaintiffs in *Guy v. Miller* in Nevada District Court (No. 11-OC-00042-18, Nev. Dist. Ct., Carson City);

I consulted for the Florida Democratic Party in *In re Senate joint Resolution of Legislative Apportionment* in the Florida Supreme Court (Nos. 2012-CA-412, 2012- CA-490); I am consultant for the Romo plaintiffs in *Romo v. Detzner* in the Circuit Court of the Second Judicial Circuit in Florida (No. 2012 CA 412); I am consultant for the San Antonio Water District intervenor in *League of United Latin American Citizens v. Edwards Aquifer Authority* (No. 5:12cv620-QLG, Federal District Court for the Western District of Texas, San Antonio Division); I am consultant for the Harris plaintiffs in *Harris v. McCrory* in U.S. Federal District Court in North Carolina Middle District (No. 1:2013cv00949).

4. My areas of expertise include American government, with particular expertise in electoral politics, representation, and public opinion, as well as statistical methods in social sciences. I am author of numerous scholarly works on voting behavior and elections, the application of statistical methods in social sciences, legislative politics and representation, and distributive politics. This scholarship includes articles in such academic journals as the *Journal of the Royal Statistical Society. the American Political Science Review, the American Economic Review, the American Journal of Political Science, Legislative Studies Quarterly, the Quarterly Journal of Political Science, Electoral Studies*, and *Political Analysis*. I have published articles on issues of election law in the *Harvard Law Review, Texas Law Review, Columbia Law Review, New York University Annual Survey of Law*, and the *Election Law Journal*, for which I am a member of the editorial board. I have coauthored three scholarly

books on electoral politics in the United States, *The End of Inequality: Baker v. Carr and the Transformation of American Politics*, Going Negative: How Political Advertising Shrinks and Polarizes the Electorate, and The Media Game: American Politics in the Media Age. I am coauthor with Ted Lowi, Ben Ginsberg, and Ken Shepsle of *American Government: Power and Purpose.* My curriculum vita with publications list is attached to this report.

5. I have been hired by the Rodriguez Plaintiffs in this case. I am retained for a rate of $400 per hour, which is my standard consulting rate.

III. Data and Sources

6. Data on population and voting in the Voting Tabulation Districts (VTD) and Congressional Districts (CD) come from the redistricting website of the Texas Legislative Council. (http://www.tlc.state.tx.us/redist/redist.html)

7. Data on Citizen Voting Age Population (CVAP) for 2008 and 2010 come from the American Community Survey (ACS). Specifically, I rely on the 5-year average of the ACS from 2006-2010 for estimates of the CVAP for 2008 and the 5-year average of the ACS from 2008-2012 for estimates of the CVAP for 2010. The CVAP for 2000 come from the Census Enumeration Long-Form Survey from 2000, which is no longer used. (http: //www.census.gov / population/www /cen2000 /briefs/phct31/index.html)

8. One question regarding the ACS is whether its estimates of population align with the Census' official enumeration.

The ACS is a survey of approximately 3 million persons nationwide conducted each year by the Census Bureau. In the case in *Perez v. Perry* in the Federal District Court in the Western District of Texas, I filed a Response to Professor Rives Rebuttal Report on the Use of the American Community Survey and Estimates of the Citizen Voting Age Population (Document 272-1 submitted August 31, 2011). The 2005-2009 ACS estimated too little population and Voting Age Population (VAP) compared with the Census Enumeration, which raised questions about the CVAP estimates. The gist of my response report was that the discrepancies between the 2010 enumeration and the ACS 2005-2009 CVAP data, which were used to evaluate districting maps in Texas, was mostly a function of time trend. (See, e.g., page 5 of my response report.)

9. The ACS 2008-2012 provides very good estimates of population and VAP. The ACS estimates the total population of Texas to be 25,208,895 and the VAP of Texas to be 18,359,570, compared with the Census enumeration count of 25,145,561 total population and 18,279,738 VAP. The population and VAP figures for the State differ by a trivial amount-63,334 total population difference and 79,832 VAP difference. These discrepancies amount to differences of two tenths of one percent for total population and four tenths of one percent for VAP. Differences of this magnitude will not affect any inferences drawn about the composition of the districts.

IV. Findings

A. Overview

10. This report provides information about the racial composition of CDs and racial voting patterns in the State of Texas. The report provides updated information on CVAP for the State, for specific Counties and for all CDs under Plans C100, C220, and C235 using ACS 2008-2012. (See Section IV Band Table 5.)

11. It is possible, with a reasonable degree of effort, to create more minority opportunity congressional districts in the State of Texas than were created in Plan C235. Overall, there were 11 minority opportunity districts under Plan C100, and there are 11 or 12 minority opportunity districts under Plan C235, depending on the classification of CD 23. Plan C220 demonstrates that it was possible to draw at least 13 districts in which minorities can elect their preferred candidates. Plan C220 is a reasonable demonstration map. It was drawn by the Federal District Court in the Western District of Texas in the case of *Perez v. Perry* following traditional districting principles and practices. (See Section C.)

12. A specific focus of this report is on the population, voting patterns, and number of minority opportunity districts in the South and Southwest portions of the state. This region stretches from El Paso in the West to San Antonio and Austin in the South Central part of the State, to Corpus Christi and to Cameron County on the southern tip of Texas. In this region of the State, it is

possible to create at least one more minority opportunity district than was created under Plan C235. The report shows this two ways. First, that fact is demonstrated using Plan C220, a map drawn by the Federal District Court in the Western District of Texas in the case of *Perez v. Perry*. This map was drawn in accordance with traditional districting principles by the Federal District Court. That Plan has at least one more minority opportunity CD than C235. Second, this is shown with reference to populations of VTDs in Majority HCVAP CDs under Plans C100 and C235. (See Section D.)

13. This report shows that that CD 25 in C100 was a minority opportunity district owing to the high rate of cross over vote among Whites and the cohesion of minority voters in this area. (See Section E, especially part 5.)

14. This report shows that the division of Travis County and of Plan C100's CD 25 followed racial lines more strongly than other lines. In particular race is a stronger predictor than party vote of which VTDs in Travis (or in Plan C100's CD 25) are placed in specific CDs under C235. (See Section F.)

B. Population Growth

1. State of Texas

15. The population of the State of Texas grew from 20,851,820 persons in 2000 to 25,145,561 persons in 2010. The additional 4,293,741 persons qualified Texas for four additional Congressional Districts for the decade 2011 to 2020.

16. Most of the growth in total persons, total persons of voting age, and total number of citizens of voting age occurred among racial or ethnic minorities. Table 1 provides figures on population growth in the State of Texas from 2000 to 2010.

17. The number of Hispanics increased by 2,791,255, from 6,669,666 to 9,460,921. As a percent of the total population of Texas, Hispanics increased from 32.0% to 37.6% of all persons in Texas between 2000 and 2010.

18. The number of Blacks (Black non-Hispanic) increased by 582,639, from 2,493,057 to 3,075,696. As a percent of the total population of Texas, Blacks increased from 12.0 to 12.2% of all persons in the State of Texas from 2000 to 2010.

19. The number of Whites (White Alone) increased by 464,032, from 10,933,313 to 11,397,345. As a percent of the total population of Texas, Whites decreased from 52.4% to 45.3% of all people in the State of Texas from 2000 to 2010.

20. Of the 4.3 million persons added to the population of Texas from 2000 to 2010, 78.6 percent were Hispanic or Black and 10.8 percent were White.

21. Texas added 2,591,265 Citizens of Voting Age (CVAP) from 2000 to 2010. In calculating CVAP I use the 2008-2012 estimate of the CVAP from the American Community Survey conducted by the United States Census Bureau, as provided by the Texas Legislative Council and figures made available through the Census website

(http:// www.census.govjrdojdatajvoting_age_population_by_citizenship_and_race_cvap.html).

22. The number of Hispanic Citizens of Voting Age (HCVAP) increased by 1,236,607, from 2,972,988 to 4209,595. As a percent of all Citizens of Voting Age in the State of Texas, Hispanics increased from 22.3% to 26.5% from 2000 to 2010.

23. The number of Black Citizens of Voting Age increased by 432,549, from 1,638,026 to 2,070,575. As a percent of all Citizens of Voting Age in the State of Texas, Blacks increased from 12.3% to 13.0% from 2000 to 2010.

24. The number of White Citizens of Voting Age increased by 659,267, from 8,305,993 to 8,965,260. As a percent of all Citizens of Voting Age in the State of Texas, Whites decreased from 62.5% to 56.4% from 2000 to 2010.

25. Minorities accounted for most of the growth of the Citizen Voting Age Population from 2000 to 2010. Of the 2.5 million additional Citizens of Voting Age in the State Texas over the past decade, 64.4 percent of those additional adult citizens were Hispanic or Black and 25.4 percent were White Alone.

2. Largest Counties

26. In this section I focus on the six most populous counties in the State of Texas and the size and growth of their Citizen Voting Age Populations. The analysis elucidates where growth in the eligible electorate is occurring, among which groups, and at what rates.

27. I use the 2006-2010 5-year average of the American Community Survey (ACS) population estimates to estimate the 2008 Citizen Voting Age Population, as 2008 is the mid-year of that 5-year window. I use the 2008-2012 5-year average of the ACS to estimate the 2010 Citizen Voting Age Population.

28. Table 2 presents the Citizen Voting Age Population among racial groups in the State of Texas for the years 2008 (2006-2010 ACS average) and 2010 (2008-2012 ACS average). The table provides CVAP estimates for the six most populous counties and the state as a whole.

29. These six counties accounted for half of the increase in CVAP in the state from 2008 to 2010 (i.e., from the 2006 to 2010 ACS to 2008 to 2012 ACS). The CVAP of the State of Texas State grew by an estimated 614,145 from 2008 to 2010; the six most populous counties added 299,598 in that time.

30. Statewide, Hispanic CVAP and Black CVAP are growing at a much faster rate than White CVAP. White CVAP increased 144,450, a 1.6% over the two year span; Hispanic CVAP increased 320,025, an 8.2% rate over the two year span; Black CVAP increased 83,650 and at a 4.2% rate over the two-year span.

31. Population projections for the CVAP of the State of Texas and for particular groups and areas can be made by assuming the same rate of growth from 2010 to 2014 as occurred for each group from 2008 to 2010. Under that assumption, I project that there are 9,254,443

White adult citizens, 4,928,274 Hispanic adult citizens, and 2,233,601 Black adult citizens in the State of Texas in 2014.[1] I project that total CVAP in Texas in 2014 is 17,187,825. Hence, I project that Whites comprise 53.8% of the CVAP; Hispanics, 28.7% of the CVAP; and Blacks 13.0% of the CVAP. The remaining 4.5% CVAP consists of those who identify as Asian, American Indian, or mixed or other races.

32. In each of these six largest counties, minority CVAP grew at a much faster rate than White CVAP. And, in every one ofthese counties, the number of Hispanics adult citizens increased by more than the number of White adult citizens did Whites.

33. In the Dallas-Fort Worth area (Dallas and Tarrant Counties), for example, the total CVAP increased from 2,414,179 to 2,502,140 from 2008 to 2010, an increase of 3.6%. Whites accounted for only 4,500 persons of that growth. In these two counties combined White CVAP grew by only 0.3%. By comparison, Hispanic CVAP rose by over 46,000 persons, an 11.3% rate, and Black CVAP rose by more than 25,000 persons, a 4.9% rate. There are 1,379,185 White Citizens of Voting Age in Dallas and Tarrant counties combined and 988,595 Black and Hispanic Citizens of Voting Age in these counties. Assuming the same rates of growth have continued through 2014, I would

1. I make this projection using simple compounding on a 2-year basis. That is, I multiply the 2010 CVAP estimate times the square of 1 plus the two year rate of growth. So, if a group grew at 5 percent every two years, and had 100,000 persons in 2010, I project that it would have 1.05*1.05*100,000 = 110,250.

project that here are today approximately 1,151,592 Black and Hispanic adult citizens in Dallas and Tarrant counties and 1,387,473 White adult citizens

C. Overall Appraisal of Minority Opportunity Districts

34. This section offers a summary assessment of the number of majority Black, majority Hispanic, majority Black plus Hispanic, and cross over districts in the existing Congressional District map for the State of Texas (plan C235), in the Congressional District map used to elect Texas' Congressional Delegation from 2006to 2011 (Plan C100), and in the map drawn by the Federal District Court in the Western District of Texas in San Antonio (Plan C220). Plan C100 offers a baseline for comparison with Plan C235. Plan C220 offers a map that demonstrates how many minority opportunity districts could be constructed. This section does not offer the functional analysis of these districts. That is offered in section E.

35. I use Plan C220 as a reference map because it was drawn by the Federal District Court, which followed traditional districting principles and districting criteria.[2] Although the Supreme Court of the United States intervened and stopped the use of the map for the 2012 election, it did not invalidate the map itself. The Supreme Court did criticize the district configuration in the Dallas-Fort Worth area in

2. Doc. 544, November 26,2011, *Perez v. Perry* in the United States District Court for the Western District of Texas, Case 5:11-cv-00360-OLG-JES-XR, especially pages 5-7 and 16-17.

C220, and C235 adjusted the boundaries of CD 33. CD 33 under C220 and CD 33 under C235 in Dallas and Tarrant Counties are majority Black plus Hispanic districts. The adjustment to the boundaries in Dallas and Tarrant counties, then, did not change the number of minority districts that Plan C220 could achieve in that area. As such, C220 demonstrates how many minority opportunity districts might be constructed with reasonable effort and following traditional districting criteria and principles.

36. Table 3 presents my overall assessment of the number and types of minority opportunity districts under Plans C235, C100, and C220.

37. Based on racial composition of districts and voting patterns, analyzed later in this report, I determine that there were 11 districts in which Blacks or Hispanics had the opportunity to elect their preferred candidates under Plan C100.

38. There were 7 majority Hispanic CVAP districts under Plan C100. These were CDs 15, 16, 20, 23, 27, 28, and 29. There was 1 majority Black CVAP district under Plan C100's CD 30. There were two majority Black plus Hispanic districts, CDs 9 and 18, and one cross over district, CD 25. The Federal District Court in the District of Columbia determined based on evidence presented in trial that CD 25 was a functioning cross over district in its rulings in the case of *State of Texas v. United States.*[3] The

3. Document #230. Case 1:11-cv-01303-RMC-TBG-BAH, filed August 28,2012, page 73, and pages 76-88.

State of Texas' expert agreed during that trial that CD 25 is district in which minorities have the ability to elect their preferred candidates in general elections.[4] I present analyses below of CD 25 under Plan C100. Please see my reports in the trial in Federal District Court, Doc. 123-1 (filed Aug. 8, 2011), in the Western District of Texas in San Antonio (under the Constitution of the United States and Section 2 of the Voting Rights Act–hereafter referred to as the San Antonio Case) and in the Federal District Court, Doc. 77-3 (filed Oct. 25, 2011),[5] and Doc. 115-3 (filed Jan. 17, 2012), in the District of Columbia (under section 5 of the Voting Rights Act) for further evidence on the question of whether CD 25 was a functioning cross over district under C100.

39. There are as many as 12 districts in which Blacks or Hispanics have the opportunity to elect their preferred candidates under Plan C235.

40. There are 8 majority Hispanic CVAP districts under Plan C235. These are CDs 15, 16, 20, 23, 28, 29, 34, and 35. There are 2 majority Black CVAP districts under Plan C235's CDs 9 and 30. There are two majority Black plus Hispanic CVAP districts, CDs 18 and 33, and no cross over districts.

41. CD 9 under Plan C235 is a majority Black plus Hispanic CVAP district if one counts only those identified as Black

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4. Op cit., page 75, especially footnote 4.

5. This is the same as Doc. 155-2 (filed Jan. 17, 2012), in that case.

Alone as Black CVAP (BCVAP). CD 9 is Majority Black CVAP if one counts as Black those who identify as Black Alone or Black and White or Black and American Indian. Those categories combine to 50.2% BCVAP.

42. CD 23 under Plan C235 is majority HCVAP. However, Hispanic preferred candidates do not reliably win majorities of the vote in this district in statewide elections. In my original assessment of the exogenous elections in CD 23 under Plan C185, Hispanic preferred candidates did not reliably win majorities in the VTDs in CD 23. Based on that evidence, I concluded that CD 23 in C185 may not be a minority ability district.[6] In Section E, I will revisit this question below for CD 23 in Plan C235 relying on elections from 2008 to 2012. It should be noted here, though, that in exogenous elections, in CD 23 under Plan C235, candidates preferred by Hispanics won only 47.4% of the vote on average. [See Table 10.] Thus, there are 11 or 12 districts in which minorities have the opportunity to elect their preferred candidates under Plan C235.

43. Plan C220 contained 13 districts in which Blacks or Hispanics have the opportunity to elect their preferred candidates.

44. Plan C220 had 8 majority Hispanic CVAP districts. These were CDs 15, 16, 20, 23, 27, 28, 29, and 35. There

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6. Ansolabehere, Stephen, "Report on Minority and White Representation and Voting Patterns in the Texas Congressional District Plans C185 and C100," in the case State of Texas v. United States, in the Federal District Court of the District of Columbia, Doc. 77-3 (filed Oct. 25, 2011).

was 1 majority Black CVAP district under Plan C220 CD 30. There were three majority Black plus Hispanic CVAP districts, CDs 9, 18 and 33, and one cross over district. Plan C220 maintained CD 25 as a cross over district.

45. Plan C220 demonstrates that it is possible to create at least one more minority opportunity district than was constructed in Plan C235 and at least two more than existed under Plan C100. Plan C220 was constructed by the Federal District Court following reasonable districting criteria.

D. Potential for Hispanic Majority CDs in South and Southwest Texas

46. I assess the number of potential Hispanic majority or Hispanic opportunity CDs that could be created in South and Southwest Texas in two ways. First, I calculate the population of all Voting Tabulation Districts (VTDs) in majority Hispanic CDs in the South and Southwest Texas region in either C100 or C235. The Texas State Legislature created majority Hispanic CDs in South and Southwest Texas in these two maps, and the set of all VTDs in these districts offers one way to define the population that reasonably could be put in majority Hispanic CDs in this region. Second, I examine a demonstration map to determine whether it is possible to configure CDs in this region so as to increase the number of majority Hispanic CDs beyond what was accomplished in Plan C235. Rather than work from a new map, I use C220 as the demonstration map.

47. First, consider the potential number of majority Hispanic districts based on population in the envelope of all VTDs in majority Hispanic CDs in either C100 or C235. These are VTDs in CDs in South and Southwest Texas that are or were majority Hispanic as constructed by the Texas State Legislature.

48. Table 4 presents a count of the total number of persons in VTDs that were in majority Hispanic Districts in the South and Southwest part of the State of Texas in either C100 or C235. The table presents the tabulation for the majority Hispanic CDs and also including a cross over district in the region, Plan C100's CD 25.

49. This calculation suggests that there is the potential to create at least 7 majority Hispanic CDs in South and Southwest Texas. There were over 5.3 million people in this set of VTDs, and the ideal population for a Congressional District in the State of Texas is 698,488. The ratio of the total population in the set of VTDs to the ideal district population is 7.6 districts. Consideration of plan C220 will further show that this many districts could be constructed while following traditional districting principles commonly accepted by courts.

50. Including CD 25 under Plan C100 (a cross over district) in this calculation suggests that it is possible to create at least 8 minority opportunity districts in South and Southwest Texas. The total population in the set of VTDs in minority opportunity districts in this area is more than 8 times the population of an ideal district, if all of the VTDs in Plan C100's CD 25, which was a cross over district, are included in the calculation.

51. It may be possible to include other counties, such as Ector and Midland, in this area. My analysis only focuses on the set of VTDs that the State Legislature placed in Majority Hispanic CVAP districts under either Plan C100 or Plan C235.

52. A second approach is to consider an alternative map that demonstrates that at least 7 majority Hispanic CVAP districts (or 8 minority opportunity districts) can in fact be drawn in this region of the State. Again, C220 serves as such a demonstration map.

53. Table 5 presents the CVAP statistics for Whites, Blacks, and Hispanics in each of the districts in the State of Texas under Plans C100, C220, and C235.

54. C100 contained 6 majority Hispanic CDs in South and Southwest Texas. These were CDs number 15, 16, 20, 23, 27, and 28. In addition, C100 contained a cross over district, CD 25, in this area.

55. C235 contains 7 majority Hispanic CVAP CDs in South and Southwest Texas. These are CDs number 15, 16, 20, 23, 28, 34, and 35. CD 23 under the configuration in Plan C235 might not function as a district in which minorities can elect their preferred candidates, as discussed in section E. Plan C235 has no cross over districts in the State of Texas, and it has no majority Black plus Hispanic districts in South and Southwest Texas.

56. Examination of Plan C220 reveals that 7 majority Hispanic CDs in South and Southwest Texas could have

been created. Under Plan C220 the 7 majority Hispanic CDs in this part of the state are CDs 15, 16, 20, 23, 27, 28, and 35. A configuration along the lines of Plan C220 would preserve CD 27 by keeping most Nueces County Hispanics in a majority Hispanic CVAP district in South Texas.

57. Plan C220 also preserved Plan C100's CD 25, which was determined to be a cross over district by the Federal District Court in District of Columbia in the Section 5 trial involving the districting process in Texas and which I concluded was a cross over district.

58. Consequently, based on a demonstration plan and on the total population in Hispanic majority CDs in the area, it is possible to create at least 7 majority Hispanic CVAP districts. And, Plan C220 further demonstrates that it is possible to maintain a cross over district in this area. Plan C235 creates 7 majority Hispanic districts in this area, one of which (i.e., CD 23) may or may not function as a district in which minorities have the ability to elect their preferred candidates, and no cross over districts.

E. Voting Patterns in Districts

59. Classification of districts as minority opportunity districts depends on the voting patterns in the districts, as well as the racial composition of the districts. The opinion of the Supreme Court of the United States in *Thornburg v. Gingles* established that ecological regression may be used to measure the degree of cohesion in voting among racial groups and the degree of polarization between racial

groups. These factors are one of several forms of evidence that may be used to determine whether districts may have discriminatory effects. (478 US (1986) 30, 52-59)

60. My reports in the proceedings in the San Antonio Case and in the Section 5 Case provide evidence of racial voting patterns in the State of Texas, in various counties and regions in the state, and in Congressional Districts in question. I refer the Court to those reports.[7]

61. This report provides further analysis using elections from 2012, as well as 2008 and 2010, and analyzes voting patterns under Plan C235 as well as C100. I examine federal races in 2008 and 2012 (U.S. President, U.S. Senate, and U.S. House), as the Congressional Districts in question involve federal offices. I also examine Governor and Attorney General in 2010, as these are two prominent statewide races. I examine statewide races (except in the case of U. S. House) as the candidates are the same everywhere, permitting readier comparison of results across districts.

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7. See Ansolabehere, Stephen, "Report on Minority and White Representation and Voting Patterns in the Texas Congressional District Plans C185 and C100," in State of Texas v. United States, Federal District Court of the District of Columbia Doc. 77-3 (filed Oct. 21, 2011, especially pages 30- 42); Ansolabehere, Stephen, "Rebuttal Report to the Supplemental Expert Report of Doctor John Alford," in State of Texas v. United States, Doc. 155-3; and Ansolabehere, Stephen, "Report on Minority and White Representation and Voting Patterns in the Texas Congressional District Plan C185" in *Perez v. Perry*, Doc. 123-1.

1. Statewide Analysis of Voting Patterns

62. Ecological regression analysis reveals that there is a high degree of racial polarization and high group cohesion in the State of Texas. Table 6 presents ecological regression estimates of the percent of each group who voted for the Democrat over the Republican for U.S. President, U.S. Senate and U.S. House in 2012.

63. In the 2012 elections, nearly all Blacks voted for Democratic candidates in the elections for U.S. President, U.S. Senate, and U.S. House. Approximately 70 to 80 percent of Hispanics voted for Democratic candidates in these elections, statewide. Only 6 to 13 percent of Whites voted for Democratic candidates in these elections.

2. Cohesion and Polarization estimates in Minority Opportunity CDs in South and Southwest Texas, and Travis.

64. Ecological regression analysis shows that there is a high degree of racial cohesion and racial polarization in South and Southwest Texas. I define the region, for the sake of convenience as all VTDs that that were in Congressional Districts 15, 16, 20, 23, 25, 27, or 28 under Plan C100 or that are in Congressional Districts 15, 16, 20, 23, 28, 34, or 35 under Plan C235. (One may also define the region as a set of counties. The results do not differ substantively.)

65. Table 7 presents an analysis of voting behavior of racial groups in potential minority opportunity districts

in South and Southwest Texas. The vote variable in the regression (dependent variable) is the Average Percent of Two-Party Vote Won by Democratic Candidates for President in 2008, U.S. Senate in 2008, Governor in 2010, Attorney General in 2010, President in 2012, and U.S. Senate in 2012. No U. S. House elections are included in this average, so this represents the percent of vote won by Democratic candidates in the Exogenous Elections in the VTDs in these districts. These particular races are chosen because they are immediately comparable to U.S. House elections as federal elections (President and Senate) or at or near the top of the ballot (Governor or Attorney General). They are statewide elections so the results reflect the voters' evaluations of the same candidates in all parts of the district.

66. The top panel of Table 7 corresponds to the districts in Plan C100. Within most of the Congressional Districts in South and Southwest Texas under Plan C100 racial groups exhibited a high degree of cohesion. There was also high polarization between Whites on one side and Hispanics and Blacks on the other. Roughly 80 percent of Hispanics and 90 percent of Blacks voted for Democratic candidates in these districts. Typically 5 percent of Whites in this area voted for Democratic Candidates for U.S. President or U.S. Senate.

67. There is one notable exception to the pattern of polarization in these districts. CD 25 under Plan C100 shows a high level of cohesion among minorities, as in the other districts, but a relatively low level of cohesion among Whites. In this district a minority of 41.6% Whites voted

for candidates preferred by Blacks and Hispanics. The district with the next highest level of White support for minority preferred candidates was CD 20, with 20% voting for the candidate preferred by Blacks and Hispanics. Under Plan C100, then, CD 25 exhibited substantial cross over vote among Whites.

68. The bottom panel of Table 7 presents estimates of voting patterns in exogenous elections among racial groups in the CDs in South and Southwest Texas under Plan C235. As with the configuration of districts under Plan C100, there is high polarization between Hispanics and Whites in this area. Hispanic vote for Democratic candidates ranges from 79 to 83 percent, across districts. White vote for minority-preferred candidates ranges from 0 to 20 percent.

69. Under Plan C235, there is no CD in which Whites exhibit a high level of cross over voting, even though this is the same set of elections as in the top panel in the table (corresponding to Plan C100). This is because the White voters that were in CD 25 under C100 and crossed over in significant numbers are split across several districts in Plan C235. Specifically, those voters end up in CD 35 under Plan C235 (see Table 7) and CDs 10, 21, and 25 (not shown in Table 7) under Plan C235.

70. The 2012 U.S. House elections (the endogenous elections) show similar patterns of cohesion and polarization to the statewide (exogenous) elections. Table 9 provides estimates of voting behavior of racial groups in the 2012 U.S. House elections under Plan C235.

71. Hispanics show a very high level of cohesion, consistently across districts in both Plan C100 and Plan C235. Roughly, 75 to 90 percent of Hispanics vote for Democratic candidates in every district in this region. Under Plan C100 Whites in all but CD 25 voted from 0 to 20 percent for minority preferred candidates. In CD 25, however, an estimated 53 percent of Whites voted for the Democrat in the 2008 U.S. House election and 37 percent of Whites voted for the Democrat in the 2010 U.S. House election. Nonetheless, the Democrat, who was preferred by minority voters, won both elections.

72. In the 2012 U.S. House election conducted under C235, racial groups vote much more cohesively within each district. Democratic candidates won between 78% and 97% of the Hispanic vote, depending on the district. Also, the configuration of the districts under the interim map was such that no district exhibits a high rate of cross over voting among Whites. Under Plan C235, he Democratic candidates won 20 and 22 percent of the White vote in CDs 20 and 35, respectively.

73. In sum, there is high racial cohesion and high polarization in all Hispanic CVAP majority districts in South and Southwest Texas Congressional Districts in Plan C235 and in all but one district in that area in Plan C100. This pattern holds true in both the exogenous and endogenous elections, and in the 2012 elections, as well as the 2008 and 2010 elections. The exception to this pattern was CD 25 under Plan C100, where there was substantial support for minority-preferred candidates among White voters. Plan C235 divides the racial groups

in the South and Southwest Texas area so that the highest vote among Whites for minority-preferred candidates is approximately 20 percent.

74. The reconfiguration of three districts from Plan C100 is of particular concern, CD 23, CD 25, and CD 27. The treatment of the populations in these districts affects the configuration of all other districts in the South and Southwest Texas region.

3. CD 23 Under Plan C235

75. As established in my report to the Federal District Court in the District of Columbia in the Section 5 trial, CD 23 was a district in which minorities had the ability to elect their preferred candidates, but the reconfiguration of the district reduced the voting strength of minorities in this area. My earlier report (especially sections C and D) detail how this occurred.[8]

76. A key test of the performance of a district is whether candidates preferred by minorities actually win a majority of the vote in elections in the VTDs in a proposed district. Table 10 presents the percent of the two-party (Democrat plus Republican) vote received by minority-preferred candidates in 2012 federal elections and on average from 2008 to 2012 in the South and Southwest Texas area. I

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8. See Ansolabehere, Stephen, "Report on Minority and White Representation and Voting Patterns in the Texas Congressional District Plans C185 and C100," in *State of Texas v. United States*, Federal District Court of the District of Columbia, Doc. 77-3 (filed Oct. 25, 2011), especially pages 30-42.

use the analysis in tables 8 and 9 to determine which candidates minority voters preferred. I then calculate the percent of the two-party vote won by those candidates in general elections.

77. Candidates preferred by minorities in CD 23 fall short of a majority in the election for U.S. President and U.S. Senate among the VTDs in CD 23 under Plan C235. In the average election, the candidates preferred by minorities received only 47.4% of the vote. Across all six elections used to construct the average vote (President 2008 and 2012, Senator 2008 and 2012, Governor 2010, and Attorney General 2010), the minority preferred candidate won the majority of vote in only 2 of the 6 in the VTDs that comprise CD 23 under Plan C235. Those are the exogenous elections. There has been one endogenous election under this map, in 2012. In that election, the minority preferred candidate won 52.5% of the vote.

78. In the majority of elections examined, the minority preferred candidate did not win a majority of votes in the VTDs in CD 23 under Plan C235.

4. Analysis of Nueces County and CD 27 under C100 and C235

79. The reconfiguration of CD 27 takes a substantial Hispanic population out of a majority Hispanic CVAP CD under Plan C100 and places them into a plurality White CD (27) under Plan C235.

80. CD 27 under Plan C235 contains Nueces County and part of San Patricio County. Nueces County was entirely

in CD 27 under Plan C100. Of the 340,223 persons in this county, 206,293 (60.6%) are Hispanic. The portion of San Patricio County that was in CD 27 under Plan C100 contained 37,264 persons, of which 15,025 (40.3%) are Hispanic. The portion of San Patricio County that is in CD 27 under Plan C235 contains 44,379 persons, of which 20,151 (45.4%) are Hispanic.

81. Based solely on CVAP data, CD 27 in Plan C100 was majority Hispanic. Under Plan C100, 65.9% ofCVAP in CD 27 was Hispanic. Hispanic preferred candidates held a slight edge in this district in statewide elections from 2008 to 2012. Under Plan C100, the Hispanic preferred candidate won the 2008 U.S. House election in CD 27 with 60.2% of the two-party vote. The Hispanic preferred candidate lost the 2010 U.S. House election in CD 27 with 49.6% of the two-party vote. In the VTDs in CD 27 under Plan C100, the Hispanic preferred candidates won 54.7% of the 2012 Presidential vote, 51.7% of the 2012 U.S. Senate vote, 50.2% of the 2010 Governor vote, 41.2% of the vote for Attorney General, and 53.7% of the 2008 Presidential vote.

82. CD 27 in Plan C235 is plurality White. In this district, 49.6% of the CVAP is White, and 48.8% is Black or Hispanic. It may be possible, with sufficient White cross over voting, to elect minority-preferred candidates in this district. However, the district does not function as an effective cross over district.

83. Looking at statewide elections in the VTDs in this district, the Hispanic preferred candidates won 38.7% of the 2012 Presidential vote, 39.2% of the 2012 U. S. Senate

vote, 41.1% of the 2010 Governor vote; and 40.4% ofthe 2008 Presidential vote.

84. Racial groups in CD 27 under Plan C235 exhibit high levels of cohesion and polarization in their voting. Using the Average Democratic Share of the Two- Party Vote, ecological regression analysis estimates that 8.8 percent of Whites voted for Hispanic Preferred candidates, 77.6 percent of Hispanics voted for those candidates, and 93.6 percent of Blacks voted for those candidates.[9] In the 2012 U.S. House election, ecological regression estimates reveal that 7.1 percent of Whites, 79.6 percent of Hispanics, and 96.4 percent of Blacks voted for the Democratic candidate.

85. In sum, Plan C235 puts a substantial Hispanic population from Nueces and San Patricio Counties that was in a majority Hispanic CD into a district that is majority White. Both districts exhibit high levels of racial cohesion and polarization. And CD 27 under Plan C235 does not function as a cross over district.

5. Analysis of Travis County and CD 25 under C100

86. The Federal District Court in District of Columbia issued a decision in the Section 5 case on August 28, 2012. That court found that CD 25 under Plan C100 was a functioning cross over district, and, thus, a minority

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9. AVERAGE DEM VOTE SHARE in VTD in CD 27 under C235 =.0881 + .8481% Black of VAP + .6881*% Hispanic of VAP; N=312, R^2 = .852.

opportunity district. The VTDs from that district within Travis County were divided into 5 separate districts under Plan C185 and is divided into those same districts under Plan C235. Th3e August 2012 decision was consistent with the analysis and evidence that I offered to the court.[10]

87. I will not repeat, other by reference, the evidence entered in that case regarding the representation of minorities in CD 25 under Plan C100. However, the reports filed there pointed to several factual conclusions about this district. (1) Whites are a majority of the district. (2) Blacks and Hispanics are cohesive and vote for the same candidates in general elections and usually vote for the same candidates in primary elections. (3) Whites are not highly cohesive, but a majority tends to vote against candidates preferred by Blacks and Hispanics in general elections. (4) The candidate preferred by Hispanics and Blacks in primary election voting won the primary elections for U.S. House in this district from 2006 to 2010.

88. Tables 7 and 8, and analyses provided in my earlier reports, show that the minority-preferred candidates won majorities of votes in exogenous and endogenous

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10. See Ansolabehere, Stephen, "Report on Minority and White Representation and Voting Patterns in the Texas Congressional District Plans C185 and C100," in State of Texas v. United States, Federal District Court of the District of Columbia, Doc. 77-3 (filed Oct. 25, 2011), especially pages 34- 40; See Ansolabehere, Stephen, "Rebuttal Report to Doctor John Alford," in State of Texas v. United States, Federal District Court of the District of Columbia, Doc. 155-3 (Jan. 16, 2012), especially pages 17-27;

elections in CD 25 under Plan C100. That was true even when majorities of Whites voted for the opposing candidate. Typically, Whites voted just 42% of the time for minority-preferred candidates in exogenous elections in this district, but that was sufficient cross over vote so that the minority-preferred candidates won the majority of the vote in the VTDs in CD 25 under Plan C100. Most notably, in the 2010 U.S. House election in this district, the minority preferred candidate, Lloyd Doggett, won just 37% of the vote of Whites, but he still won the congressional election in this district.

89. Lloyd Doggett was also the candidate preferred by minorities in congressional primary elections in this area. There are few primaries in Congressional races in the area of Plan C100's CD 25 and Travis County. In 2004 and 2012 there were contested primaries for U. S. House of Representative, both involving Congressman Lloyd Doggett. In 2004, Doggett ran against Leticia Hinojosa. In 2012 (in CD 35), he ran against two opponents, Sylvia Ramo and Maria Luisa Alvarado. Lloyd Doggett won both primaries by a wide margin. He won 64.4% of all votes in the 2004 primary. He won 73.2% of all votes in the 2012 primary, and 91.9% of all votes in the VTDs that were in CD 25 under Plan C 100. Table 11 presents the estimated voting behavior of racial groups in the VTDs that were in CD 25 in primary elections. This does not encompass all VTDs that were in CD 25 under Plan C100, but those VTDs that were in that CD and either in CD 25 in 2004 or in CD 35 under Plan C235 in 2012. As demonstrated in Table 11, all racial groups preferred Doggett to the opposing candidates.

F. Analysis of the Division of Travis County and of CD 25 Under Plan C100

90. The Federal District Court in Western Texas issued a preliminary ruling in the San Antonio Case on March 19, 2012, regarding Plan C100's CD 25 and the division of Travis County. The court's ruling stated that more evidence is required concerning the division of Travis County and of CD 25. (See Document 691, page 48.) Specifically, the court cites testimony from witnesses from the State of Texas asserting that the division of Plan C100's CD 25 was primarily motivated to defeat Lloyd Doggett and for partisan rather than racial purposes. (See Document 691, page 44.)

91. No statistical evidence to this effect was provided by those witnesses or cited by the court. The court left open the possibility that such evidence might inform later decisions concerning this map. While that testimony concerned Plan C185, the division of Travis County and of Plan C100's CD 25 in Plan C235 follows the boundaries for this area laid down in C185.

1. Targeting Lloyd Doggett

92. One motivation asserted as a rationale for the reconfiguration of districts in Travis County was to defeat Congressman Lloyd Doggett. Congressman Doggett represented CD 25 under Plan C100. The majority (60%) of the Voting Age Population in CD 25 under Plan C100 was in Travis County.

93. The plurality of Voting Age Persons from Plan C100's CD 25 in Travis County ended up in CD 35. CD 35 under the interim map is identical to CD 35 in Plan C185.

94 In CD 25 under Plan C100, Lloyd Doggett received 52.8% of all votes cast in the 2010 Congressional general election for this district, 65.8% in 2008, and 67.3% in 2006.

95. In 2012, Lloyd Doggett ran in CD 35 under the interim map. Congressman Doggett won 64.0% of the vote in 2012 in CD 35. There is no statistical evidence that the redrawing of districts in Travis County had the effect of reducing the vote share received by Congressman Doggett, let alone defeating him.

96. The Texas State Legislature did not change the boundaries of CD 35 when it adopted C235 in 2013, after Lloyd Doggett had won election to this district.

2. Division of Racial Groups in Travis County

97. A question raised in the March 19, 2012, opinion of the Federal District Court in the Western District of Texas is whether the division of Travis County is primarily racial or partisan. I address this question two ways. First, I examine the division and racial composition of VTDs across Congressional Districts in Plans C100 and C235. Second, I consider how strongly racial composition and party vote predict which VTDs are in which districts.

(a) Maps

98. Maps 1 and 2 show the boundaries of Congressional Districts in Travis County under Plans C100 and C235, respectively. The maps are centered on the City of Austin. The gray-scale represents the percent Black non-Hispanic population in each Voting Tabulation District, with darker grays meaning higher percentage Black and lighter grays meaning higher percentage non-Black.[11]

99. The highest concentration of Blacks is in Central and Eastern Travis County, with a significant portion of the population in East and Central parts of the City of Austin. The VTDs with the highest percentage Black VAP in this area are 101, 105, 114, 117, 118, 121, 122, 124, 126, 129, 132, 151, and 444. All of these VTDs were in CD 25 under Plan C100, except for VTD 105, which was in CD 10.

100. Plan C235 splits these VTDs across three districts. VTDs 105, 114, and 118 are in CD 10 under C235. VTDs 122, 124, 126, 129, 132, and 151are in CD 25. VTDs 101, 117, 121, and 444 are in CD 35.

101. Three VTDs in northern Travis County have at least 20% Black VAP. These are VTDs 161, 148, and 216. All were in CD 10 under Plan C100. All three are put in CD 17 under Plan C235.

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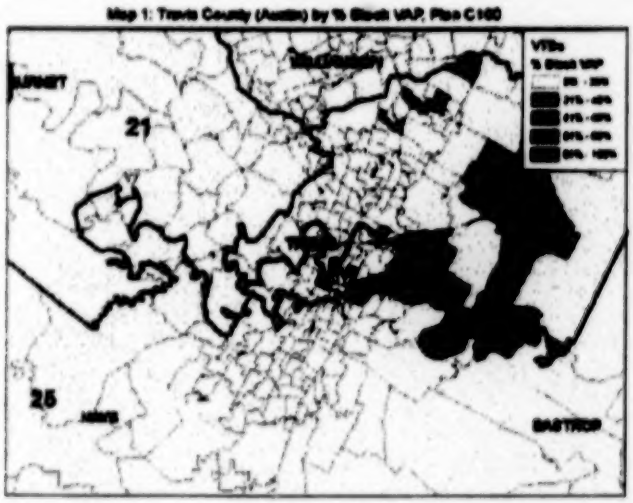
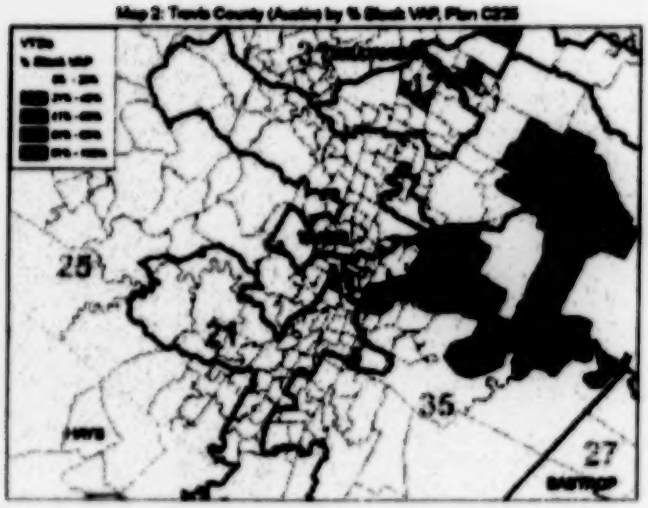
11. VTD 125 has 1 person. That person is Black, so that VTD shows up as 100% Black Also VTD 432 has 4 persons, one of whom is Black

102. Maps 3 and 4 show the boundaries of Congressional Districts in Travis County under Plans C100 and C235, respectively. The gray-scale represents the percent Hispanic population in each Voting Tabulation District, with darker grays meaning higher percentage Hispanic and lighter grays meaning higher percentage non Hispanic. The Hispanic population is most highly concentrated in Southern and Eastern parts of the county and in the northern part of the City of Austin.

103. Much of the area of Travis County that is placed into CD 35 under C235 was in CD 25 under C100. Compare maps 3 and 4. Specifically, CD 25 under C100 contained the southern quarter of Travis County, and most of that area is put in CD 35 under Plan C235. The Hispanic population in the northern part of the City of Austin was contained in CD 10 under Plan C100; C235 also incorporates the VTDs from CD 10 with the highest percent Hispanic in CD 35.

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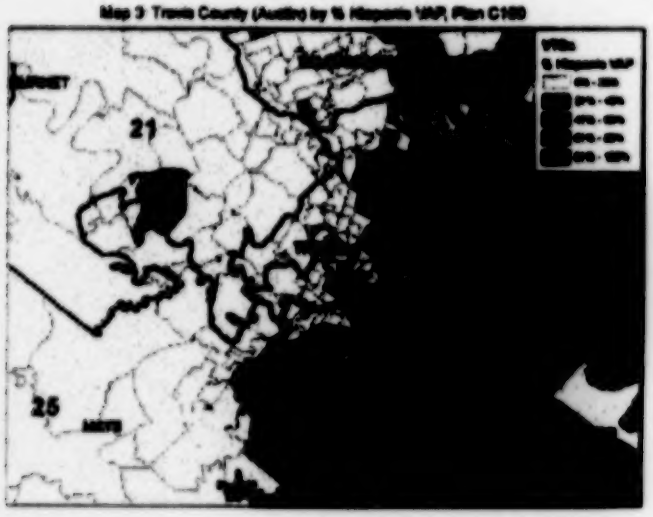
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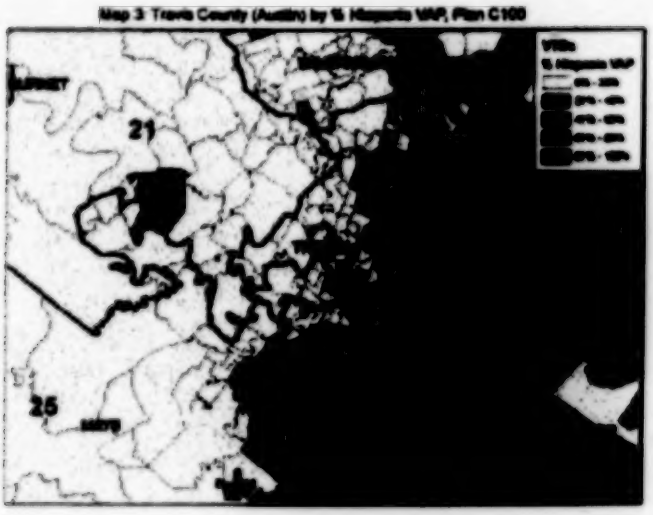

(b) Correlation between District Boundaries and Race and Party in Travis County

104. The opinion of the Federal District Court in the Western District of Texas in its March 19, 2012 opinion left open the possibility of a demonstration that race is more important than party in C185's and C235's division of Travis County and of CD 25.

105. A simple way to address that question is to examine whether race or party are stronger correlates or predictors of which VTDs ended up in which CDs. If party is at least as important as race, then measures of party strength, especially voting strength, ought to correlate more strongly than race with which CD a VTD is in.

106. Table 12 presents the correlations between racial composition of a VTD and inclusion of that VTD into a given district in Travis County. Those correlations are on the top panel. The table also presents the correlations between inclusion of a VTD in a given CD and the party vote in that district in Travis County. Specifically, the measures of vote are the Percent of the Two-Party Vote (Democrat plus Republican) won by Democrats for President in 2008, Governor in 2010, and President in 2012, and the Average Percent of the Two-Party Vote won by Democrats in six elections (President 2008, U.S. Senate 2008, Governor 2010, Attorney General 2010, President 2012 and U.S. Senate 2012).

107. The stars in the table indicate statistically significant values. Entries with one star are significantly different from zero with probability less than .05; entries with two stars are significantly different from zero with probability less than .01. Lower probability values mean that I am more certain that the observed correlation is different from zero.

108. The racial indicators are statistically significantly correlated with inclusion of VTDs in specific CDs. Only for CD 10 is there no statistically significant correlation between the racial composition of the VTD and the likelihood that it is included in a given VTD. That is, with the exception of CD 10, racial factors are significant predictors of which VTDs end up in which CDs in Travis County.

109. The party vote indicators are also correlated with the indicators of whether a VTD is included in specific districts for 2 (possibly 3) of the 5 CDs. None of the party vote indicators is related to (or predictive of) whether a VTD is included CDs 10 or 21. Only one of the vote measures (Governor 2010) is correlated with inclusion in CD 17, and that correlation is quite weak. Party vote is consistently and significantly related to inclusion in CDs 35 and 25.

110. Comparing the top and bottom panels reveals that race is a stronger predictor than party vote of which VTDs are put in which CDs. For CD 35, the correlations are .73 and -.60 for Percent Hispanic VAP and Percent Anglo VAP, respectively. The party vote correlations range from .35 to .40, only about half as strong as the racial correlations. For CD 25, the correlations are .34 and -.38 for Percent Hispanic VAP and Percent Anglo VAP. The correlations for party vote range from .20 to .27. None of the correlations is significant for CD 10. For CD 21, the correlations are .21 and -.24 for Percent Anglo VAP and Percent Black VAP, respectively. The party vote correlations range from .06 to .09, and none is significant. For CD 17, there is a significant correlation between Percent Black VAP of .19, and a significant correlation between percent Democrat for Governor in 2010 of -.15.

111. Race, then, is a stronger correlate and predictor than party vote of which VTDs are placed in which CDs in Travis County under Plan C235. When the correlations are significant, the racial correlations are twice as strong as the party vote correlations among the VTDs. See, in particular, the correlations for CDs 21, 25, and 35.

112. Table 13 restricts the correlation analysis further. Specifically, the analysis is of only VTDs in Travis that were in CD 25 under Plan C100. Looking at this subset, the correlations of the racial variables are even stronger than for the county as a whole. In other words, race is an even stronger predictor of which Travis County VTDs ended up in which CDs when we restrict the subset of VTDs only to those that were in CD 25 under Plan C100. The same is not true of the party indicators. The party vote variables are less strongly correlated and weaker predictors than the racial variables of which VTDs ended up in which CDs among the subset ofVTDs that were in CD 25 under Plan C235.

3. Division of Racial Groups in Plan C100's CD 25

113. Looking at the district level rather than the county level, it is evident that Plan C235 divides CD 25 under Plan C100 more along racial lines than party lines. Consider all VTDs that were in CD 25 under Plan C100 and the division of those VTDs into new CDs under Plan C235. Specifically, I create an indicator of which CD a given VTD is placed in under Plan C235 and correlate the racial composition of and party vote of the VTDs with the indicators of the CDs in which VTD is included under Plan C235. Table 14 presents correlations between White VAP, Black VAP, and Hispanic VAP and indicators of which CD a given VTD is in under Plan C235. The table also presents the correlation between the Democrat's Percent of the Average Two-Party Vote and indicators of which CD a given VTD is in under Plan C235.

114. The racial variables are highly predictive of which VTDs that were in CD 2 5 under Plan C100 end up in CDs 25 and 35, and show significant correlations for CDs 10 and 21. The racial composition of the VTDs is not predictive of which of Plan C100's CD 25's VTDs ended up in CDs 27 or 34 under Plan C235. Note, none of the VTDs that ended up in CDs 27 or 34 under Plan C235 were Travis County VTDs.

115. Party vote is also correlated which VTDs that were in CD 25 under Plan C100 end up in particular CDs under Plan C235.

116. The party correlations are, on the whole, weaker than the racial correlations. Specifically, the racial correlations are at least twice as large as the party vote correlations for CDs 21, 25, and 35 under Plan C235, and they are about the same as each other for CD 10. For CD 27 the party vote correlations are stronger than the racial correlations, and all the correlations are quite weak for CD 34. As noted above, all of the VTDs in Plan C235's CD 27 and CD 34 lie outside of Travis County. None of the party vote correlations is as strong as the racial correlations for CD 25 and CD 35 under Plan C235.

117. Based on this pattern of correlations, race was a stronger predictor than party in the determining which VTDs in Travis County ended up in which CDs under Plan C235 and which VTDs in Plan C100's version of CD 25 ended up in which CDs under Plan C235.

Table 1. 2000 and 2010 Texas Population, Voting Age Population, and Citizen Voting Age Population						
	Total Population		Voting Age Population		Citizen Voting Age Population Population	
	2000	2010	2000	2010	2000	2010
All People	20,851,820	25,145,561	14,977,890	18,279,738	13,299,845	15,891,110
White Alone	10,933,313	11,397,345	8,423,235	9,074,684	8,305,993	8,965,260
Hispanic	6,669,666	9,460,921	4,287,444	6,143,144	2,972,988	4,209,595
Black, non- Hispanic	2,493,057	3,075,696	1,683,430	2,196,195	1,638,026	2,070,575
Note: Total Population and Voting Age Population are from the 2000 and 2010 Census Enumeration. Citizen Voting Age Population for 2000 is from the Census Long Form survey in that year; Citizen Voting Age Population for 2010 is from the American Community Survey 2008-2012, with 2010 as the mid-year.						

Table 2. Citizen Voting Age Population Estimates among Racial Groups for 2008 and 2010 in the State of Texas and its 6 Most Populous Counties, Using the Five Year ACS Averages for 2008 (2006-2010) and for 2010 (2008-2012)					
		Citizen Voting Age Population and Growth Rate By Group			
County	Year	Total	White	Hispanic	Black
Harris	2008	2,230,550	1,051,265	530,490	508,540
	2010	2,328,000	1,054,485	590,280	530,755
	% Growth	4.4%	0.3%	11.3%	4.4%
Dallas	2008	1,321,135	657,305	250,680	345,630
	2010	1,360,390	649,069	277,395	359,125
	% Growth	3.0%	-1.3%	10.7%	3.9%
Tarrant	2008	1,093,044	717,280	156,765	164,245
	2010	1,141,750	730,125	176,280	175,795
	% Growth	4.5%	1.8%	12.4%	7.0%
Bexar	2008	1,082,495	412,845	560,100	82,750
	2010	1,135,610	420,345	593,520	89,240
	% Growth	4.9%	1.8%	6.0%	7.8%
Travis	2008	629,720	406,805	129,195	57,825
	2010	666,065	424,600	140,200	61,390
	% Growth	5.8%	4.4%	8.5%	6.2%

El Paso	2008	425,970	83,295	320,195	14,715
	2010	450,700	85,030	340,530	16,350
	% Growth	5.8%	2.1%	6.4%	11.1%
State of Texas	2008	15,276,965	8,820,810	3,889,570	1,973,520
	2010	15,891,110	8,965,260	4,209,595	2,057,170
	% Growth	4.0%	1.6%	8.2%	4.2%

Table 3. Total Number of and Types of Minority Opportunity Districts under Plans C100, C220, and C235

	Plan C100 (2006-2011 Districts)	Plan C220 (Court Drawn Interim Map)	Plan C235 (2012-present)
	Number of CDs (CD Numbers)		Number of CDs (CD Numbers)
Majority Hispanic CVAP	7 (15, 16, 20, 23, 27, 28, 29)	8 (15, 16, 20, 23, 27, 28, 29, 35)	7 or 8 (15, 16, 20, 28, 29, 34, 35; 23 is in question)
Majority Black CVAP	1 (30)	1 (30)	2 (9, 30)
Majority Black+ Hispanic CVAP	2 (9, 18)	3 (9, 18, 33)	2 (18, 33)
Cross Over	1 (25)	1 (25)	0
Total Number of CDs in State	32	36	36

Source: Report RED 116 for C235 and C100.

Table 4. Population of VTDs in Majority Hispanic CDs in Either Plan C100 or Plan C235		
	VTDs in Majority Hispanic CDs in Either C100 or C235	**VTDs in Majority Hispanic CDs in Either C100 or C235 Plus Plan C100's CD 25**
Total Population	5,303,855	5,832,330
Number of Potential CDs (Population/698,488)	7.59	8.35
Total Voting Age Population Total Hispanic Voting Age Population	3,723,489	4,134,056
	2,577,930	2,673,048

Table 5. CVAP by Racial Group in Congressional Districts in C100, C220, and C235									
	C100			C220			C235		
CD #	Hispanic CVAP	Black* CVAP	White Alone CVAP	Hispanic CVAP	Black CVAP	White Alone CVAP	Hispanic CVAP	Black CVAP	White Alone CVAP
1	6.4	18.7	73.4	6.5	18.8	73.2	6.5	18.8	73.2
2	14.3	22.9	59.2	17.8	14.8	61.1	19.1	10.5	63.1
3	12.2	11.8	64.8	8.7	8.8	72.5	8.7	8.7	72.6
4	6.6	10.7	79.7	5.9	11.1	80.7	5.8	11.1	80.8
5	11.0	14.5	71.5	12.0	14.7	70.6	12.2	15.2	70.1
6	13.0	17.0	65.4	26.5	15.7	54.8	13.3	18.1	63.5
7	16.7	10.9	63.7	16.7	11.3	63.5	17.6	12.7	61.1
8	8.0	8.3	81.5	9.9	9.5	78.4	10.5	9.4	77.7
9	21.7	48.8	18.2	21.3	49.2	17.9	20.3	50.2	18.7
10	17.7	12.3	64.4	15.1	9.2	69.1	15.6	11.4	69.0
11	27.5	4.2	66.7	24.9	3.9	69.4	24.8	3.9	69.6
12	17.0	7.3	71.9	12.3	7.7	76.0	12.8	8.2	75.2
13	15.6	6.3	75.8	15.6	5.7	76.4	15.7	5.7	76.4

14	21.8	10.1	64.9	14.6	20.2	61.4	14.7	21.7	60.7
15	74.4	2.2	22.4	76.1	1.7	21.1	71.6	2.4	24.5
16	75.0	3.7	19.2	76.9	3.2	17.9	73.4	4.0	20.5
17	12.7	10.0	75.2	13.3	10.8	73.7	15.2	13.7	67.6
18	24.3	46.7	24.5	23.9	47.2	24.4	21.5	49.4	24.7
19	26.1	5.6	66.3	26.7	6.3	65.0	26.5	6.3	65.2
20	64.7	8.2	24.8	59.3	7.7	30.8	62.6	5.3	29.5
21	23.0	6.5	66.6	19.1	2.6	74.9	21.3	3.2	72.1
22	20.0	14.9	53.3	17.8	16.1	52.0	19.1	13.3	53.3
23	59.6	3.6	34.3	58.7	5.0	33.9	61.3	3.7	33.0
24	16.7	15.7	59.6	12.3	9.5	70.4	13.1	11.0	67.7
25	26.4	8.7	62.0	24.3	9.6	61.4	11.8	7.5	77.2
26	11.0	14.3	70.7	10.4	7.4	77.1	10.2	7.1	77.8
27	65.9	2.5	30.1	74.2	2.2	22.5	43.0	5.6	49.6
28	69.9	1.9	27.1	75.1	1.6	22.4	67.1	5.5	25.8
29	59.0	15.1	24.0	58.5	15.6	23.9	60.1	14.9	22.4
30	20.0	52.2	25.5	19.4	52.5	25.7	18.5	54.1	24.9
31	16.1	12.7	67.0	16.3	13.9	66.0	16.7	11.6	67.1

32	21.6	9.5	63.9	13.3	12.6	66.6	14.4	12.2	66.8
33				22.8	30.5	40.9	41.4	25.0	30.7
34				25.4	8.4	63.5	74.6	1.9	22.7
35				53.0	9.0	36.0	52.1	11.5	33.9
36				15.0	10.4	70.7	12.8	10.2	74.1
*Black Alone plus Black and White plus Black and American Indian.									

Table 6. Ecological Analysis, Statewide Point Estimate Percent Support for Democratic Candidate and Confidence Interval (in parentheses)			
	Democrat's Share of Two Party Vote in Each Race		
	President 2012	US Senate 2012	US House 2012
Black	100.0% (98.6, 100.0)	100.0% (98.2, 100.0)	100.0% (98.2, 100.0)
Hispanic	75.9% (74.9, 76.9)	71.8% (70.9, 72.7)	81.4% (80.3, 82.7)
White	10.4% (9.9, 10.9)	12.7% (12.2, 13.2)	6.2% (5.6, 6.8)
N	8606	8606	8438
R-Square	.798	.780	.732

Table 7. RACIAL VOTING PATTERNS IN NON-CONGRESSIONAL (EXOGENOUS) ELECTIONS IN MINORITY OPPORTUNITY DISTRICTS Ecological Regression Estimates of the Percent of the 2-Party Vote Won by Democratic Candidates Among Whites, Hispanics, and Blacks in CDs in South and Southwest Texas under Plan C100 and Plan C235				
	PLAN C100			
	Average Democrat Share of 2 Party Vote Among Each Group			
	Blacks	Hispanic	White	N R-Squared

CD 15	36.8% (17.6, 56.0)	80.0% (75.5, 84.5)	0.0% (0.0, 3.8)	326 .821
CD 16	93.1% (68.0, 100.0)	82.6% (74.8, 90.4)	0.0% (0.0, 7.2)	179 .799
CD 20	90.3% (78.4, 100.0)	81.9% (77.3, 86.5)	16.9% (13.1, 20.7)	253 .771
CD 23	100.0% (82.6, 100.0)	79.2% (75.8, 82.6)	7.1% (4.6, 9.6)	329 .847
CD 25	100.0% (77.4, 100.0)	82.8% (72.5, 93.1)	41.6% (37.7, 45.5)	275 .355
CD 27	100.0% (+/-22.5)	79.1% (75.8, 82.4)	5.2% (2.6, 7.8)	246 .889
CD 28	79.5% (50.2, 100.0)	79.9% (76.5, 83.4)	3.2% (0.2, 6.2)	319 .893
	PLAN C235			
CD 15	46.2% (+/-21.2)	79.7% (+/-3.6)	6.3% (+/- 3.1)	292 .871
CD 16	100.0% (+/-35.8)	81.7% (+/-8.2)	0.0% (+/- 7.4)	168 .778
CD 20	83.5% (+/-22.2)	81.1% (+/-3.9)	16.5% (+/-3.5)	230 .862
CD 23	100.0% (+/-16.0)	89.8% (+/- 3.7)	1.1% (+/- 2.8)	302 .857

CD 28	100.0% (+/-11.2)	81.5% (+/- 3.7)	4.8% (+/- 3.2)	254 .876
CD 34	49.6% (+/-25.6)	80.2 (+/- 5.2)	0.0% (+/- 5.2)	242 .830
CD 35	100.0% (+/-13.4)	86.1% (+/-7.3)	20.6% (+/-5.0)	219 .644

Note: Party Support is Average of Democratic Share of Two-Party Vote for President 2008, U.S. Senator 2008, Governor 2010, Attorney General 2010, President 2012, and U.S. Senator 2012.

Table 8. RACIAL VOTING PATTERNS IN U.S. HOUSE (ENDOGENOUS) ELECTIONS IN MINORITY OPPORTUNITY DISTRICTS

Ecological Regression Estimates of the Percent of the 2-Party Vote Won by Democratic Candidates Among Whites, Hispanics, and Blacks in CDs in South and Southwest Texas under Plan C100 (Estimate and confidence interval (in parentheses))

	2008			2010		
District	White	Hispanic	Black	White	Hispanic	Black
CD 15	16.4% (13.0, 19.8)	83.0% (78.7, 87.3	71.5% (44.1, 98.9)	0.0% (0.0, 4.6)	77.4% (71.6, 83.2)	34.1% (0.0, 72.0)
CD 16	*	*	*	0.0% (0.0, 5.6)	79.4% (75.8, 86.0)	54.4% (21.0, 87.7)
CD 20	30.5% (27.0, 34.0)	89.7% (85.3, 94.1)	84.7% (74.4, 95.0)	8.5% (3.4, 13.6)	86.8% (80.3, 92.3)	69.0% (53.4, 84.6)

CD 23	10.4% (8.6, 12.2)	88.5% (86.8, 90.2)	85.5% (79.8, 100.0)	1.4% (0.0, 3.6)	82.2% (78.9, 85.5)	72.1% (52.0, 92.2)
CD 25	53.1% (50.2. 56.0)	92.9% (83.6, 100.0)	100.0% (80.4, 100.0)	37.4% (33.3, 41.5)	84.6% (70.8, 98.4)	100.0% (70.2, 100.0)
CD 27	14.0% (11.9, 16.1)	83.6% (80.8, 86.4)	100.0% (76.8, 100.)	1.7% (0.0, 4.4)	79.1% (75.3, 82.9)	99.4% (65.1, 100.0)
CD 28	27.6% (25.3, 29.9)	91.5% (88.8, 93.8)	35.3% (11.7, 57.9)	0.0% (0.0, 2.8)	87.8% (84.3, 91.2)	71.0% (42.2, 100.0)
* No Republican Candidate.						

Table 9. RACIAL VOTING PATTERNS IN U.S. HOUSE (ENDOGENOUS) ELECTIONS UNDER THE INTERIM MAP (Plan C235)

Ecological Regression Estimates of the Percent of the 2-Party Vote Won by Democratic Candidates Among Whites, Hispanics, and Blacks in CDs in South and Southwest Texas under Interim Map (Plan C235)
(Estimate and confidence interval (in parentheses))

	2012 U.S. House Election		
CD	White	Hispanic	Black
15	0.0% (0.0, 2.6)	86.6% (83.4, 89.8)	100.0% (77.8, 100.0)
16	25.9% (21.0, 30.7)	77.8% (72.2, 83.4)	66.1% (39.7, 92.5)

20	22.1% (19.5, 24.7)	89.1% (85.9, 92.3	70.7% (52.1, 89.3)
23	5.8% (3.6, 8.0)	81.8% (78.4, 85.1)	100.0% (83.5, 100.0)
28	8.6% (6.4, 10.8)	92.7% (89.9, 93.5)	100.0% (91.8, 100.0)
34	0.0% (0.0 3.7)	84.1% (79.6, 88.6)	40.0% (10.0, 70.0)
35	19.6% (14.6, 23.6)	91.7% (83.8, 98.7)	100.0% (85.6, 100.0)

Table 10. Percent of Two-Party Vote for Minority Preferred Candidates Under Plan C235

	President 2012	US Senate 2012	US House 2012	Average 2008-2012*
CD15	58.0%	56.1%	62.3%	56.3%
CD16	65.0%	61.7%	66.5%	63.3%
CD20	59.8%	59.4%	65.6%	58.0%
CD23	48.6%	46.7%	52.5%	47.6%
CD28	60.9%	56.9%	69.5%	58.3%
CD34	61.3%	57.0%	63.1%	58.6%
CD35	64.5%	64.2%	66.6%	62.6%

*Average Percent of Two-Party Vote for Minority Preferred Candidates for President 2008 and 2012, U.S. Senate 2008 and 2012, Governor 2010, and Attorney General 2010. Weighted by Turnout.

Table 10a. Percent of Two-Party Vote for Minority Preferred Candidates Under Plan C220			
Congressional District	President 2012	US Senate 2012	Average 2008-2012*
CD15	63.4%	60.9%	61.4%
CD16	67.5%	63.9%	65.6%
CD20	61.0%	60.8%	58.8%
CD23	51.0%	49.2%	49.6%
CD27	60.5%	56.4%	57.4%
CD28	61.2%	57.0%	58.8%
CD35	54.3%	54.3%	53.7%
*Average Percent of Two-Party Vote for Minority Preferred Candidates for President 2008 and 2012, U.S. Senate 2008 and 2012, Governor 2010, and Attorney General 2010. Weighted by turnout.			

Table 11. Ecological Regression Estimates of Vote For Lloyd Doggett in Contested Congressional Primaries		
	2004 U.S. House Primary	2012 U.S. House Primary
White	97.1% (93.7, 100.0)	90.9% (88.7, 93.0)
Black	79.6% (70.0, 89.2)	99.0% (85.8, 100.0)
Hispanic	66.7% (59.7, 73.7)	91.3% (83.7, 97.9)
Number of VTDs R-Square	85 .525	68 .025

Table 12. Correlations between Racial and Partisan Variables and Whether a Voting Tabulation District in Travis County is included in a Given CD under Plan C235						
		Into CD 35	Into CD 25	Into CD 21	Into CD 17	Into CD 10
RACIAL VARIABLES	% Anglo VAP	-.604**	+.340**	+.205**	-.064	+.082
	% Hispanic VAP	+.730**	-.377**	-.123	-.099	-.111
	% Black VAP	+.166**	-.046	-.244**	+.187**	-.026

PARTY VARIABLES	% Dem for President 2008	+.366**	-.220**	+.083	-.115	-.108
	% Dem for Governor 2010	+.346**	-.201**	+.093	-.154*	-.088
	% Dem for President 2012	+.398**	-.271**	+.057	-.080	-.090
	Average% Democrat 2008-2012	+.374**	-.229**	+.076	-.119	-.098

Note: Correlations are across Voting Tabulation Districts, weighted by total Voting Age Population in each VTD. Average % Democrat uses President, Senate, and Governor vote shares for 2008, 2010, and 201

*Statistically different from 0 at $p<.05$. Threshold: r = +/- .127

**Statistically different from 0 at $p<.01$. Threshold: r = + /- .165
N = 237

Table 13. Correlations between Racial and Partisan Variables and Whether a Voting Tabulation District in CD 25 under Plan C100 within Travis County is included in a Given CD under Plan C235

		Into CD 35	Into CD 25	Into CD 21	Into CD 10
RACIAL VARIABLES	% Anglo VAP	-.682**	+.283**	+.411**	+.035
	% Hispanic VAP	+.782**	-.477**	-.326**	-.050
	% Black VAP	+.139	+.202*	-.325**	-.008
PARTY VARIABLES	% Dem for President 2008	+.241*	-.180	-.112	+.117
	% Dem for Governor 2010	+.206*	-.158	-.119	+.154
	% Dem for President 2012	+.303**	-.203*	-.158	+.111
	Average % Democrat 2008-2012	+.250**	-.178	-.135	+.131

Note: Correlations are across Voting Tabulation Districts, weighted by total Voting Age Population in each VTD. Party Variables are percentages of the 2-Party Vote for each office. Racial Variables are White Only, Black Non-Hispanic, and Hispanic VAP. Average% Democrat uses President, Senate, and Governor vote shares for 2008, 2010, and 201

*Statistically different from 0 at $p<.05$. Threshold: r = +/- .187

**Statistically different from 0 at $p<.01$. Threshold: r = + /- .243

N = 106

Table 14. Correlations between Racial and Partisan Variables and Whether a Voting Tabulation District in CD 25 under Plan C100 is included in a Given CD under Plan C235

	Into CD 10	Into CD 21	Into CD 25	Into CD 27	Into CD 34	Into CD 35
% Anglo VAP	+.191**	+.256**	+.259**	+.108	-.012	-.646**
% Hispanic VAP	-.216**	-.221**	-.404**	-.077	+.046	+.729**
% Black VAP	+0.034	-.238*	+.128	-.030	-.046	+.115*
Average % Democrat 2008-2012	-.285**	+.130*	+.009	-.382**	-.115*	+.314**

Note: Correlations are across Voting Tabulation Districts, weighted by total Voting Age Population in each VTD. Party Variables are percentages of the 2-Party Vote for each office. Racial Variables are White Only, Black Non-Hispanic, and Hispanic VAP. Average% Democrat uses President, Senate, and Governor vote shares for 2008, 2010, and 201

*Statistically different from 0 at $p<.05$. Threshold: r = + /- .10

**Statistically different from 0 at $p<.01$. Threshold: r = +/- .15 N = 275

Nos. 17-586, 17-626

In the Supreme Court of the United States

GREG ABBOTT, ET AL., APPELLANTS

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

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QUESTIONS PRESENTED

1. Whether the district court issued an appealable interlocutory injunction when it invalidated Texas congressional and state-house redistricting plans and effectively prevented Texas from using those plans in future elections, by imposing expedited deadlines for the State to either engage in another round of legislative redistricting or face court-imposed redistricting just days before districts had to be set for the 2018 elections.

2. Whether the Texas Legislature acted with an unlawful purpose when it enacted districts imposed by the district court itself—which the district court had imposed pursuant to this Court's 2012 mandate to fix any plausible constitutional and statutory defects in prior legislative plans that were repealed without ever having taken effect—and when there was no unlawful taint behind these court-imposed districts to begin with, as the district court explained in its lengthy 2012 opinions.

3. Whether state-house districts in Nueces County produced a vote-dilution effect when the district court expressly recognized that an additional performing majority-minority opportunity district could not be created there without breaking the State's rule to maintain county lines if possible—which the court held was not required by the Voting Rights Act.

4. Whether the Texas Legislature engaged in racial gerrymandering in reconfiguring Tarrant County's HD90 when the Legislature had a strong basis in evidence to believe that consideration of race was necessary under the Voting Rights Act to maintain HD90 as a majority-Hispanic district.

PARTIES TO THE PROCEEDING

Plaintiffs in the district court are Shannon Perez, Gregory Tamez, Nancy Hall, Dorothy DeBose, Carmen Rodriguez, Sergio Salinas, Rudolfo Ortiz, Lyman King, Armando Cortez, Socorro Ramos, Gregorio Benito Palomino, Florinda Chavez, Cynthia Valadez, Cesar Eduardo Yevenes, Sergio Coronado, Gilberto Torres, Renato De Los Santos, Jamaal R. Smith, Debbie Allen, Sandra Puente, Kathleen Maria Shaw, TJ Carson, Jessica Farrar, Richard Nguyen Le, Wanda F. Roberts, Mary K. Brown, Dottie Jones, Mexican American Legislative Caucus - Texas House of Representatives (MALC), Texas Latino Redistricting Task Force, Joey Cardenas, Alex Jimenez, Emelda Menendez, Tomacita Olivares, Jose Olivares, Alejandro Ortiz, Rebecca Ortiz, Margarita V Quesada, Romeo Munoz, Marc Veasey, Jane Hamilton, John Jenkins, Eddie Rodriguez, City of Austin, Constable Bruce Elfant, Travis County, David Gonzalez, Milton Gerard Washington, Alex Serna, Sandra Serna, Betty F. Lopez, Beatrice Saloma, Joey Martinez, Lionor Sorola-Pohlman, Balakumar Pandian, Nina Jo Baker, Juanita Valdez-Cox, Eliza Alvarado, the League of United Latin American Citizens (LULAC), Henry Cuellar, Texas State Conference of NAACP Branches, Howard Jefferson, Bill Lawson, Eddie Bernice Johnson, Sheila Jackson-Lee, Alexander Green, United States of America, Rod Ponton, Pete Gallego, Filemon Vela, Jr., Gabriel Y. Rosales, Belen Robles, Ray Velarde, Johnny Villastrigo, Bertha Urteaga, Baldomero Garza, Marcelo H. Tafoya, Raul Villaronga, Asenet T. Armadillo, Elvira Rios, Patricia Mancha, and Juan Ivett Wallace.

Defendants in the district court are Greg Abbott, in his official capacity as Governor of Texas, Rolando Pablos, in his official capacity as Texas Secretary of State, the State of Texas, Steve Munisteri, in his official capacity as Chair of the Texas Republican Party, Boyd Richie, Gilberto Hinojosa, in his official capacity as Chair of the Texas Democratic Party, and Sarah M. Davis.

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INTRODUCTION

There are few things a legislature can do to avoid protracted litigation over its redistricting legislation. But if the nearly inevitable litigation comes to pass, one would have thought there was one reasonably safe course available to bring it to an end—namely, enacting the three-judge court's remedial redistricting plan as the legislature's own. Think again.

As it turns out, even that will not suffice, as the decisions below reached the remarkable conclusion that the Texas Legislature engaged in intentional racial discrimination by enacting into law maps imposed by the same district court one cycle earlier to remedy alleged infirmities with the Legislature's initial maps. According to the district court, *its own maps* were infected with the "taint of discriminatory intent"—a taint that the Legislature (but apparently not the court) was obligated to "remove" if it wanted to adopt those maps as state law rather than just abide by them as a judicial decree.

That conclusion is every bit as implausible as it sounds and entirely turns on its head this Court's repeated emphasis on the primacy of States and state legislatures when it comes to redistricting. The maps at issue here were imposed after this Court instructed the district court "to draw interim maps" for Texas's 2012 elections "that do not violate the Constitution or the Voting Rights Act." *Perry v. Perez*, 565 U.S. 388, 396 (2012) (per curiam). And by its own telling in lengthy 2012 opinions, the district court assiduously abided by that mandate. There is absolutely no support for the novel propo-

sition that the same map can be constitutional when imposed by the court, but unconstitutional—let alone intentionally discriminatory—when embraced by the legislature. If anything, the strong presumption of good faith that applies to state redistricting legislation ought to be virtually unassailable when a legislature enacts redistricting plans only after a federal court has issued opinions explaining in exhaustive detail how those plans addressed every "plausible" constitutional or statutory objection, H.J.S. App. 313a, and were "not purposefully discriminatory," C.J.S. App. 408a.

The district court concluded otherwise only by jettisoning nearly every pillar of this Court's redistricting jurisprudence—from the strong presumption of constitutionality and good faith, to the primacy of States and state legislatures in redistricting, to the extraordinary caution courts must exercise when confronting intentional-discrimination claims, to the principle that intentional vote dilution exists only when the legislature actually sets out to reduce minority voting strength, to the rule that VRA compliance is a defense to racial-gerrymandering claims. Under a correct application of those settled legal principles, the plaintiffs have not come close to satisfying their burden of proving that the Legislature enacted the district court's own maps in a sinister effort to discriminate against minority voters. Instead, all the evidence confirms that the obvious answer is the right one: the Legislature embraced the court's maps for the perfectly permissible reason that it wanted to bring the litigation to an end and took the court at its word that those maps complied with the Constitution and the VRA.

The district court's decision to invalidate its own remedial maps as intentionally discriminatory cannot stand.

OPINIONS BELOW

The three-judge district court's order on Plan C235 is available at 274 F. Supp. 3d 624. C.J.S. App. 3a-119a. The district court's order on Plan H358 is available at 267 F. Supp. 3d 750. H.J.S. App. 3a-87a.[1]

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1253. *See infra* Part I. Appellants filed their notice of appeal of the order on Plan C235 on August 18, 2017, C.J.S. App. 1a-2a. Appellants filed their notice of appeal of the order on Plan H358 on August 28, 2017. H.J.S. App. 1a-2a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The State's current congressional redistricting plan was enacted by the Act of June 21, 2013, 83rd Leg., 1st C.S., ch. 3, 2013 Tex. Gen. Laws 5005-5006. *See* Statutory Appendix 34a. The State's current Texas House of Representatives districts were enacted by the Act of June 23, 2013, 83rd Leg., 1st C.S., ch. 2, 2013 Tex. Gen. Laws 4889-5005. *See* Statutory Appendix 1a. Both statutes have been challenged under the Fourteenth Amendment and §2 of the Voting Rights Act (VRA), 52 U.S.C. §10301.

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[1] The abbreviation "C.J.S. App." refers to the jurisdictional statement appendix in No. 17-586. The abbreviation "H.J.S. App." refers to the jurisdictional statement appendix in No. 17-626.

STATEMENT

A. In 2011, following the decennial census, the Texas Legislature enacted redistricting plans for Texas state-legislative and congressional districts.[2] Before the Legislature even enacted those plans, however, the plaintiffs filed this lawsuit challenging the State's congressional redistricting plan (Plan C185) and its redistricting plan for the Texas State House of Representatives (Plan H283) under the Constitution and VRA §2. The Chief Judge of the Fifth Circuit constituted a three-judge district court under 28 U.S.C. §2284. J.A. 2a.

Because Texas was subject to VRA §5 at that time, its legislatively enacted plans could not take legal effect until they were precleared. *See* 52 U.S.C. §10304. Texas sought preclearance by filing a suit for declaratory judgment in the United States District Court for the District of Columbia.

B. While the D.C. preclearance lawsuit was still pending, the Texas three-judge district court proceeded to conduct a two-week trial on the constitutional and VRA §2 challenges to the not-yet-operative 2011 plans. J.A. 13a-17a. Because a final judgment in the preclearance litigation seemed unlikely to come in time for the 2012 election cycle, the district court ordered the parties to submit proposed interim plans for the 2012 elections. J.A. 17a-18a.

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[2] Act of May 21, 2011, 82nd Leg., R.S., ch. 1271, 2011 Tex. Gen. Laws 3435-3552 (creating Plan H283); Act of June 20, 2011, 82nd Leg., 1st C.S., ch. 1, 2011 Tex. Gen. Laws 5091-5180 (creating Plan C185).

In November 2011, a 2-1 majority of the district court entered separate orders directing the State to conduct the 2012 elections under plans drawn by the court. Concluding that it "was not required to give any deference to the Legislature's enacted plan," the majority announced that it had drawn "independent map[s]" based on "neutral principles that advance the interest of the collective public good." *Perry*, 565 U.S. at 396. Judge Smith dissented from both orders, explaining that the majority had imposed "a runaway plan that imposes an extreme redistricting scheme" that was completely "untethered to the applicable caselaw." H.J.S. App. 279a.

The State appealed, and on January 20, 2012, this Court unanimously vacated the district court's orders, holding that "the District Court exceeded its mission to draw interim maps that do not violate the Constitution or the Voting Rights Act, and substituted its own concept of 'the collective public good' for the Texas Legislature's determination of which policies serve 'the interests of the citizens of Texas.'" *Perry*, 565 U.S. at 396. Reiterating that "[r]edistricting is primarily the duty and responsibility of the State," *id.* at 392 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)), this Court explained that a district court forced to impose its own redistricting map should not simply "ignore any state plan that has not received § 5 preclearance." *Id.* at 395.

At the same time, however, this Court made clear that a district court imposing an interim plan "must, of course, take care not to incorporate into the interim plan any legal defects." *Id.* at 394. Indeed, the Court expressly instructed the district court—six separate

times—that it must impose plans that comply with the Constitution and the VRA:

- The district court's "mission [is] to draw interim maps that do not violate the Constitution or the Voting Rights Act." *Id.* at 396.
- "A district court making . . . use of a State's plan must, of course, take care not to incorporate into the interim plan any legal defects in the state plan." *Id.* at 394.
- "[A] district court should still be guided by [the State's] plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits." *Id.*
- "[T]he district court [must] confine[] itself to drawing interim maps that comply with the Constitution and the Voting Rights Act, without displacing legitimate state policy judgments with the court's own preferences." *Id.*
- "'[A] court, as a general rule, should be guided by the legislative policies underlying' a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'" *Id.* at 393 (quoting *Abrams v. Johnson*, 521 U.S. 74, 79 (1997)).
- The district court should "take guidance from the lawful policies incorporated in [a not-yet-precleared] plan." *Id.* at 395.

Moreover, this Court made clear that when assessing whether the State's plans suffered from any "legal defects," the district court need not confine itself to addressing *proven* constitutional or VRA violations. Instead, given the preliminary posture of the litigation, the Court instructed the district court to remedy any district as to which the plaintiffs had demonstrated that a constitutional or VRA §2 claim was "likely to succeed on the merits," *id.* at 394, as well as any "aspects of the state plan that stand a reasonable probability of failing to gain § 5 preclearance," which the Court also described as any aspect of the plan subject to a "not insubstantial" §5 challenge. *Id.* at 395. In other words, the Court instructed the district court to adopt maps that remedied not only any *actual* constitutional or VRA violations, but also "likely" violations and "not insubstantial" §5 claims.

C. On remand, the parties submitted proposed findings of fact and extensive briefing, including post-trial briefs from the preclearance litigation. C.J.S. App. 380a; J.A. 26a-50a. After holding two more days of hearings, J.A. 43a, the district court adopted interim congressional and state-house plans for the 2012 elections. The court explained that its interim plans "obey[ed] the Supreme Court's directive by adhering to the State's enacted plan except in the discrete areas in which we have preliminarily found plausible legal defects." H.J.S. App. 313a. The court noted that it reviewed all pending VRA §5 objections, including claims of discriminatory purpose, under "the low 'not insubstantial' standard" this Court articulated. *Id.*

Starting with the congressional plan, the district court imposed as its interim plan Plan C235, which reconfigured nine of the 36 congressional districts from the State's 2011 plan. C.J.S. App. 367a-423a. In a 56-page opinion, the court concluded that Plan C235 "sufficiently resolves the 'not insubstantial' § 5 claims and that no § 2 or Fourteenth Amendment claims preclude its acceptance under a preliminary injunction standard." *Id.* at 396a. In doing so, the court specifically found that "C235 is not purposefully discriminatory." *Id.* at 408a. The court devoted 13 pages to explaining why plaintiffs were not likely to succeed on their claims concerning two districts that Plan C235 did *not* change—CD27, based in Corpus Christi, and CD35, linking Austin and San Antonio.[3] As to the former, the court spent six pages explaining why CD27 did not intentionally dilute minority voting strength. *See id.* at 417a-423a. As to the latter, the court spent seven explaining why CD35 was not a racial gerrymander. *See id.* at 408a-417a.

The district court imposed Plan H309 as its interim House plan. Plan H309 reconfigured 28 of the State's 150 state-house districts. H.J.S. App. 300a. The district court expressly declined, however, to reconfigure the state-house districts in Bell, Dallas, Nueces, and Tarrant Counties, *id.* at 314a, finding that the plaintiffs were not likely to succeed on their §2 vote dilution claims and that any §5 claims were insubstantial. *Id.* at 308a-309a.

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[3] This brief refers to congressional districts by the abbreviation "CD" followed by the district number. It refers to state-house districts by the abbreviation "HD" followed by the district number.

D. After the Texas district court imposed its interim plans, the D.C. district court denied VRA §5 preclearance to the 2011 plans. *See Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013) (mem.). Although the plaintiffs asked the Texas court to modify its court-ordered plans based on the D.C. court's preclearance decision, the court declined. This Court then denied an application to stay Plan C235 in light of the preclearance denial, *LULAC v. Perry*, 133 S. Ct. 96 (2012) (mem.), and the State conducted its 2012 elections under the court-ordered Plans C235 and H309.

E. Although the State appealed the D.C. court's preclearance decision, before that appeal could be considered, state officials began to urge the Legislature to consider a different path forward—one that could bring certainty to the State's elections and avoid several more years of protracted litigation. The Texas Attorney General implored the Legislature that "the best way to remedy the violations found by the D.C. court is to adopt the court-drawn interim plans as the State's permanent redistricting maps." C.J.S. App. 432a. As he further explained, permanently adopting the court-ordered plans would "confirm the legislature's intent for a redistricting plan that fully comports with the law." *Id.* at 429a. Echoing the same view, on May 27, 2013, the Governor called the Legislature into a special session "[t]o consider legislation which ratifies and adopts the interim redistricting plans ordered by the federal district court." Proclamation by the Governor, No. 41-3324 (May 27, 2013).

The Legislature decided to follow that advice: On June 21 and 23, 2013, it formally repealed the 2011 redistricting plans, adopted the court-ordered Plan C235 in full, and adopted the court-ordered Plan H309 with minor changes as Plan H358. On June 26, 2013, the Governor signed into law the bills adopting Plan C235 and Plan H358.[4]

F. After the Legislature repealed the 2011 plans, the State moved to dismiss the plaintiffs' claims against those plans as moot, as the plans they challenged no longer existed. J.A. 59a. The district court summarily denied that motion without even waiting for the plaintiffs to respond. J.A. 60a. The district court then granted the plaintiffs leave to amend their complaints to assert claims against the newly enacted plans—*i.e.*, claims against the same districts that the court itself had imposed on the State for the 2012 elections, plus one statehouse district (HD90) that had been modified slightly in 2013. J.A. 62a-63a. But instead of adjudicating those new challenges to the plans that were actually in effect, the court allowed the plaintiffs to continue pursuing their claims against *the 2011 plans*—plans that had been repealed and that had never taken effect. The court also granted the plaintiffs leave to amend their complaints to

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[4] On June 25, 2013, this Court held VRA §4(b)'s coverage formula unconstitutional. *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013). The Court later vacated the judgment in the D.C. preclearance lawsuit and remanded for further proceedings in light of *Shelby County*. *Texas v. United States*, 133 S. Ct. 2885 (2013) (mem.). The preclearance litigation was ultimately dismissed as moot. C.J.S. App. 10a.

seek preclearance bail-in under VRA §3 based on the 2011 plans—once again rejecting the State's argument that claims against those plans were moot. J.A. 62a-63a.[5] The district court then conducted a *second* trial on claims challenging the repealed 2011 House plan, J.A. 87a-89a, as well as a second trial on claims challenging the repealed 2011 congressional plan, J.A. 91a-93a.

At the same time that it continued to adjudicate moot challenges to the defunct 2011 plans, the district court refused plaintiffs' requests to enjoin the plans enacted by the Legislature in 2013. J.A. 52a-53a, 94a. As a result, the State conducted elections under the legislatively adopted 2013 plans in 2014 and 2016.

G. More than two years after the second trial on the 2011 plans, and almost *four years* after those plans had been repealed, the district court issued opinions holding—by a 2-1 vote—that the plaintiffs' claims against those plans were not moot, that the 2011 Legislature engaged in intentional racial discrimination and unconstitutional racial gerrymandering, and that the 2011 plans had the effect of diluting minority voting strength in violation of VRA §2. C.J.S. App. 330a-331a; H.J.S. App. 275a. The majority also found that the plaintiffs proved "one person, one vote *Larios*-type claims" in discrete portions of Plan H283, *id.* at 276a, but rejected statewide one-person, one-vote claims, *id.* at 272a.

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[5] The United States intervened to assert claims against the repealed 2011 plans but did not assert any claims against the 2013 plans. J.A. 62a.

Judge Smith dissented as to both jurisdiction and the merits. He explained that the plaintiffs' challenges to the 2011 plan were moot because those plans were repealed in 2013 and, indeed, had never taken effect. C.J.S. App. 336a-349a; H.J.S. App. 280a. On the merits, he explained that the majority's opinion "concoct[ed] the most extreme possible reading of the raw record to justify findings that, if converted to corresponding remedies, will hand these plaintiffs pretty much everything they have sought, causing a wholesale revision in the State House and Congressional maps." H.J.S. App. 278a-279a. He noted that the majority's factual findings were legally infirm, but "even under the clearly-erroneous test, the majority's findings are fatally infected, from start to finish." H.J.S. App. 278a.[6]

H. Having spent four years adjudicating moot challenges to the repealed 2011 plans, the district court finally turned to the plaintiffs' challenges to the operative 2013 plans (Plans C235 and H358), holding a trial on those claims in July 2017. C.J.S. App. 14a. In sharp contrast to the two years the court spent reaching resolution following the trial on the defunct 2011 plans, the court issued a divided decision on Plan C235 a mere month after the trial ended. *Id.* at 14a n.13, 119a. Remarkably, even though that plan was *identical* to the one the court itself imposed in 2012, the court invalidated two districts

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[6] Judge Smith concurred, however, in the majority's narrow conclusion, with respect to one-person, one-vote claims, that the 2011 Legislature "erred in assuming . . . that the ten-percent test offers an unassailable safe haven." H.J.S. App. 278a n.1.

in Plan C235 on the ground that they were the product of intentional discrimination. The court concluded that the Legislature engaged in intentional vote dilution by adopting CD27 even though the court-ordered plan left CD27 unchanged after considering its alleged infirmities, and engaged in racial gerrymandering by adopting CD35 even though the court-ordered plan preserved that district over objections as well. *Id.* at 117a-118a.

One week later, the district court issued an opinion invalidating certain state-house districts in Plan H358. H.J.S. App. 7a n.5, 84a-85a. Here, too, the court concluded that the Legislature engaged in intentional discrimination by preserving verbatim several districts from the district court's own 2012 interim map—specifically, HD54 and HD55 (Bell County); HD103, HD104, and HD105 (Dallas County); and HD32 and HD34 (Nueces County). *Id.* at 85a. The district also found "a §2 results violation insofar as two compact [Hispanic citizen voting-age population (HCVAP)]-majority opportunity districts could be drawn within Nueces County." *Id.* But the district court itself simultaneously recognized that it was not possible to draw two *performing* majority-minority districts within Nueces County, *id.* at 49a-50a (noting that attempts to draw two such districts within Nueces County left Hispanic voters "essentially worse off than under Plan H358 because one district would not perform at all and one performed poorly (compared to Plan H358, where one district does perform consistently for Latinos)"), and the court declined to find "that § 2 requires breaking the County Line Rule to draw such districts." *Id.* at 85a. Finally, turning to HD90 (Tarrant

County), one of the very few districts that the 2013 Legislature *had* altered as compared to the court-ordered remedial map, the district court rejected the plaintiffs' intentional-vote-dilution claim but sustained their racial-gerrymandering claim—even though the 2013 Legislature had redrawn HD90 to address vote-dilution concerns raised by plaintiffs in this very case. *Id.*

While the district court declined to style either of its opinions as an "injunction," each one invalidated aspects of the State's maps, and each gave the Governor only three business days to order a special session of the Legislature to draw a new map. If the Governor declined to do so, the orders compelled defendants to prepare remedial map proposals and appear at hearings mere weeks later to redraw Texas's maps. H.J.S. App. 86a; C.J.S. App. 118a-119a. Because the deadline for finalizing all districts for the 2018 election cycle was fast approaching, and the district court's orders made plain that Texas could not use its existing maps in the impending elections, Texas sought and obtained stays of both orders pending appeal. *Abbott v. Perez*, 138 S. Ct. 49 (2017).

SUMMARY OF ARGUMENT

In 2013, the Texas Legislature adopted court-ordered remedial districts as its own. The federal court that fashioned those remedial districts did so based on a mandate from this Court to "draw interim maps that do not violate the Constitution or the Voting Rights Act." *Perry*, 565 U.S. at 396. Yet having drawn maps pursuant to a mandate to avoid even likely infirmities, the same court deemed those same districts, once adopted as state law by the Legislature, to constitute intentional discrimination on the basis of race. That conclusion "sounds absurd, because it is." *Sekhar v. United States*, 133 S. Ct. 2720, 2727 (2013). There is not a shred of support for the district court's novel theory that a legislature engages in intentional discrimination by failing to "remove" the purported "discriminatory taint" from *the court's own maps* before embracing them as its own. The district court's decision defies law and logic and cannot be sustained.

I. This Court's jurisdiction is clear. The district court's orders are appealable interlocutory orders because they have the "practical effect" of an injunction. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981). Not only did those orders conclusively find the State's 2013 congressional and state-house redistricting plans unlawful; they had the immediate practical effect of precluding the State from using those duly enacted maps in the upcoming elections and putting the state on the clock to use or lose its sovereign authority to enact new maps. The best evidence of that is the district court's extraordinary direction giving the Governor just three days to recall the Legislature or otherwise participate in the district

court's efforts to draw new judicial maps for the impending elections. The only conceivable explanation for such extreme haste and such an extraordinary demand is that the court had foreclosed use of the 2013 maps in the impending 2018 election cycle, which was set to kick off weeks later. Accordingly, while the district court may have steered clear of using the magic word "injunction," that does not obscure the fact that the court's orders had the practical effect of blocking the State from using its maps in any future elections and gave the State only the briefest of intervals to exercise its sovereign authority over redistricting, which is plainly sufficient for this Court's jurisdiction.

II. The central question on the merits is whether the Texas Legislature engaged in intentional discrimination when it adopted districts imposed by the district court itself. Plainly, it did not. A legislature does not engage in racial gerrymandering (or intentional vote dilution) by embracing, as its own, districts that a federal court *ordered* the State to use after expressly concluding that they sufficed to address every "plausible" constitutional or statutory objection.

All of the evidence confirms the commonsense conclusion that the Legislature enacted the court's own remedial districts because it took the court at its word when it concluded that those maps complied with the Constitution and the VRA and redressed every "plausible" claim otherwise. The plaintiffs' intentional-discrimination claims thus should have failed even without reference to the strong "presumption of good faith" and "extraordinary caution" that applies in this context. *Miller*

v. Johnson, 515 U.S. 900, 916 (1995). With that presumption, the question is not close.

The district court concluded otherwise based on its novel view that the Legislature was required to prove that it "removed" the "taint of discriminatory intent" that purportedly infected the court's interim maps before the Legislature embraced them as its own. That reasoning is wrong at every turn. It ignores settled law establishing that it is the plaintiffs' burden to prove that the Legislature invidiously and intentionally sought to harm minority voters because of their race, not defendants' burden to prove that the Legislature did not. It confuses discriminatory *effect*, which at least is capable of being carried over from one law to another, with discriminatory *intent*, which decidedly is not. The district court's reasoning even compels the bizarre conclusion that the district court *itself* engaged in intentional discrimination when it imposed its 2012 interim maps. And it is not even right on its own terms because the districts incorporated in the district court's interim maps were not infected with discriminatory "taint" in the first place. Accordingly, the district court's decision invalidating on racial-gerrymandering and intentional-vote-dilution grounds multiple districts that the Legislature adopted verbatim from the court's interim maps cannot stand.

III. The district court's invalidation of one state-house district on discriminatory-*effects* grounds, and its invalidation on racial-gerrymandering grounds of one of the very few state-house districts that the Legislature actually changed in 2013 suffer equally fatal defects.

As to the former, this Court's precedent confirms that VRA §2 requires additional majority-minority districts to be drawn only if they are compact, have at least a 50% minority population, and would actually perform in electing minority-preferred candidates. The district court itself acknowledged (as did the plaintiffs) that it was not possible to draw another performing minority-opportunity district in Nueces County, which suffices to invalidate the court's inexplicable conclusion that the Legislature caused vote dilution by failing to do so.

As for the latter, the Legislature altered HD90 in Tarrant County in 2013 because plaintiffs in this case insisted that the district must maintain a Spanish-surname-voter-registration majority to avoid vote dilution under VRA §2. The plaintiffs then turned around and claimed that the Legislature engaged in racial gerrymandering when it responded to that specific concern by maintaining HD90's Spanish-surname-voter-registration majority. Worse still, the district court sustained that remarkable charge on the theory that VRA-compliance is just "a vague goal" that does not justify intentionally drawing a majority-minority district. H.J.S. App. 81a. To state the obvious, a legislature does not engage in impermissible racial gerrymandering by relying on race for the limited purpose of addressing a specific complaint about potential vote dilution.

ARGUMENT

I. This Court Has Jurisdiction to Review the District Court's Orders Because They Have the "Practical Effect" of Enjoining the State's Redistricting Plans.

This Court has jurisdiction because the three-judge district court's orders constitute interlocutory injunctions, which may be appealed directly to this Court. 28 U.S.C. §1253. This Court has made clear that appellate jurisdiction turns on the "practical effect" of a court's interlocutory orders, not labels or form. *Carson*, 450 U.S. at 83. Courts thus have consistently held that "[e]ven if an order does not by its terms grant or deny a specific request for an injunction . . . the order may still be appealable if it has the 'practical effect' of doing so." *Salazar ex rel. Salazar v. Dist. of Columbia*, 671 F.3d 1258, 1261-62 (D.C. Cir. 2012); *see, e.g.*, *Thomas ex rel. D.M.T. v. Sch. Bd. St. Martin Par.*, 756 F.3d 380, 384 (5th Cir. 2014); *Etuk v. Slattery*, 936 F.2d 1433, 1440 (2d Cir. 1991). Whether a court labels an order an "injunction" therefore makes no difference; otherwise courts could put off review of their decisions through the simple expedient of omitting magic words.

That rule has particular force in the redistricting context, where the next election must take place and must take place under some map. In that context, a decision invalidating the map adopted by the legislature and used in previous elections not only prohibits the use of those maps in the upcoming elections, but implicitly or explicitly puts the state government on the clock to enact a re-

placement map forthwith or lose its opportunity to exercise its sovereign authority over redistricting. Here, of course, the district court made this explicit by giving the Governor just three days to order a special session or, failing that, directing the State to participate in the judicial map-drawing process. Such a use-it-or-lose-it order to the sovereign has the practical effect of an injunction and reinforces that the order invalidating the legislatively drawn maps operates as an injunction prohibiting their use in the upcoming election.

The orders here are plainly appealable. While the district court did not label its orders "injunctions," those orders had the unambiguous "practical effect" of prohibiting the State from conducting any future elections under its duly enacted redistricting plans. A mere one month after trial on these plans, the district court conclusively held that districts in Plans C235 and H358 violate the Constitution or the VRA, and it conclusively held that those "statutory and constitutional violations" "*now require a remedy.*" C.J.S. App. 118a; H.J.S. App. 84a (emphasis added). The district court then expressly ordered that, if the Legislature did not redraw both maps *immediately*, the court would do so itself. Indeed, the court gave the Governor just three business days to decide whether to call the Legislature into special session to draw new maps. And in the event the Governor declined to meet that court-imposed deadline, the court ordered the parties to consult with map-drawing experts, confer with each other, and come prepared to offer proposed remedial plans on September 5 and 6, 2017. C.J.S. App. 118a-119a; H.J.S. App. 86a.

The reason for this haste was clear: The October 1, 2017 deadline for implementing any changes to the maps before the 2018 election cycle was fast approaching, and the district court wanted to ensure that it could put new maps in place before that deadline arrived.[7] Indeed, if the court's orders were not intended to block the State from using Plans C235 and H358 in the impending elections, then there would have been no reason to put the Governor under a three-day deadline to haul the out-of-session Legislature back to the Capitol on an expedited basis, or to order the parties to rush to redraw the maps a mere 21 days after invalidating Plan C235 and a mere 13 days after invalidating Plan H358.

That the district court's orders had the "practical effect" of enjoining any future use of the maps is underscored by the court's response to the temporary stay Justice Alito granted pending completion of briefing on the State's stay applications. Rather than respond to that order by clarifying that it had not yet decided whether the State could still use the maps in the 2018 election cycle, the district court responded by issuing an "advisory" encouraging the parties to continue preparing for its expedited map-drawing hearing "voluntarily" so that the court's own map-drawing efforts could "be resumed expeditiously" if the stay were lifted. C.J.S. App. 425a. As

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[7] The State had advised the court in May 2017 that the Secretary of State must provide voter-registration-certificate templates to the State's 254 counties by October 1 to give county officials sufficient time to mail completed certificates to individual voters between November 15 and December 6, as required by Texas Election Code §14.001. *See* J.A. 380a-381a.

the district court itself thus made plain, new maps for the impending elections were not just a possibility; they were a certainty.

The district court's self-serving claim that it "has not enjoined [the plans'] use for any upcoming elections," J.A. 134a, 136a, is therefore no bar to this Court's jurisdiction. No matter how the court labels its orders, they are injunctions in substance. In fact, the court's orders have the exact same practical effect—conclusively invalidating districts—as the orders in numerous other redistricting appeals over which this Court has exercised jurisdiction. *See, e.g., Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Gill v. Whitford*, No. 16-1161 (U.S.). The district court should not be able to deprive the State of the ability to seek the immediate appellate relief Congress intended by refusing to admit what its orders have actually done.

The district court's orders readily satisfy all other aspects of appealability analysis. The orders leave no doubt about what has been enjoined or against whom they run. *Cf. Gunn v. Univ. Comm. to End the War in Viet Nam*, 399 U.S. 383, 388 (1970). They "affect[] predominantly all of the merits," *Salazar*, 671 F.3d at 1262, and alter the status quo, *see Calderon v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 137 F.3d 1420, 1422 n.2 (9th Cir. 1998); *Cohen v. Bd. of Trs. of the Univ. of Med. & Dentistry of N.J.*, 867 F.2d 1455, 1466 (3d Cir. 1989) (en banc). They are certain to have "serious, perhaps irreparable, consequence," *Carson*, 450 U.S. at 84, because they conclusively and immediately invalidate duly enacted redistricting plans. And the orders can be "'effectually challenged' only by

immediate appeal," *id.*, because appellate review only after the imposition of remedial maps would come too late to prevent the irreparable harm of being prohibited from using legislatively enacted maps in the 2018 elections. In short, the orders below are injunctions in everything but name, and as such are immediately appealable under 28 U.S.C. §1253.

Practical considerations reinforce the appealability of the orders under review. While in other contexts the choice may be between orderly review now or later, in the redistricting context the choice is between relatively orderly review by this Court after the three-judge court rejects the legislative map and puts the sovereign on the clock, or extremely expedited review after the three-judge court puts its own maps in place. Deferring this Court's review, as opposed to facilitating this Court's review once the district court has definitively rejected the legislative maps, has little to recommend it from a practical standpoint. In addition, permitting review once a three-judge court definitively rejects the State's maps evens the playing field. If the challengers' objections to the legislative map had been definitively rejected, the challengers would have an immediately appealable order. But when the State's defense of the map has been definitively rejected, appellees would have the State wait until the district court adds the word injunction to its disposition. That makes little sense, especially given the immediate interference with the State's sovereignty when the State is put on the clock to use or lose its primary role over redistricting.

II. The Texas Legislature Did Not Engage In Intentional Discrimination When It Enacted Districts Imposed By The District Court Itself In 2012.

The district court invalidated Plans C235 and H358 on the theory that the Legislature engaged in intentional discrimination when it adopted unchanged districts that the court itself *ordered* the State to use in 2012 after this Court instructed it to "draw interim maps that do not violate the Constitution or the Voting Rights Act." *Perry*, 565 U.S. at 396. The district court did not reach that remarkable result because it identified some "smoking gun" evidence revealing that the legislature actually believed that the court's own interim maps discriminated against minority voters. Indeed, the court did not even conclude that the Legislature deliberately set out to deny or abridge minority voting rights. Instead, the court concluded that the Legislature engaged in intentional discrimination by failing to affirmatively remove (how, the court did not explain) the "taint of discriminatory intent" that infected *the court's own remedial maps* that the Legislature later adopted as its own. That conclusion defies law and logic.

A. The Legislature Did Not Engage in Intentional Discrimination When It Adopted the Court-Ordered Districts as Its Own.

Any effort to invalidate legislation must begin with the "heavy presumption" that the law is constitutional and valid. *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990). That presumption applies with particular

force in the redistricting context. As this Court has reiterated time and again, "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915, as "reapportionment is primarily the duty and responsibility of the State," *Chapman*, 420 U.S. at 27. Moreover, courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916. A claim that a legislature acted for a constitutionally illegitimate purpose involves "a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810) (Marshall, C.J.). Accordingly, "the presumption of good faith that must be accorded legislative enactments" applies with the strongest of force when a legislature is accused of enacting intentionally discriminatory redistricting legislation. *Miller*, 515 U.S. at 916.

That grave accusation is at the heart of both intentional-vote-dilution and racial-gerrymandering claims. To prove racial gerrymandering, a plaintiff must prove "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* To prove intentional vote dilution, a plaintiff must prove not only that the challenged law has the discriminatory "effect of diluting minority voting strength," but also that the law was enacted for a "discriminatory *purpose*." *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (emphasis added). The standard for demonstrating the requisite impermissible intent is appropriately high:

> "Discriminatory purpose" ... implies more than intent as volition or intent as awareness of consequences. ... It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). And where there are "legitimate reasons" for government action, courts may "not infer a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 299 (1987).

Applying those exacting standards, this should have been an easy case. In 2013, the Legislature chose to enact districts that had been imposed by a federal court operating under a mandate from this Court to "draw interim maps that do not violate the Constitution or the Voting Rights Act." *Perry*, 565 U.S. at 396. Abiding by that instruction, the district court imposed interim maps that, by its own telling, remedied not just all *actual* constitutional or VRA violations in the 2011 plans, but all "*plausible* legal defects" in those plans. H.J.S. App. 313a (emphasis added). And the court expressly confirmed that its "interim plan ... does not incorporate any portion of the State map that is allegedly tainted by discriminatory purpose." H.J.S. App. 305a; *see also* C.J.S. App. 408a ("C235 is not purposefully discriminatory").

Taking the court at its word, the Legislature repealed the 2011 plans, enacted unchanged the court-ordered Plan C235, and enacted a House plan that made only minor changes to court-ordered Plan H309. The Legislature was not coy about its reasons for repealing the 2011 plans and embracing the court-ordered remedial plans as

its own. As the record makes clear, it adopted those plans because it believed that doing so was its best chance at adopting plans that complied with the Constitution and the VRA and its best hope to bring this litigation to a close. Statutory Appendix 35a-36a.

For example, Representative Darby, the Chairman of the House Select Committee on Redistricting, opined "that the court ordered interim maps are legally sufficient," explaining that they "represent the District Court's best judgment as to . . . fully legal and constitutional redistricting plans." 2017 Joint Ex. 10.4 at 5, 26. Representative Clardy, another member of the House committee, explained: "[I]t's a good, fair map drawn by three hard-working impartial federal judges who are very well acquainted with the law. Don't you think it's reasonable that we use . . . those maps?" 2017 Joint Ex. 13.4 at 151. Senator Seliger, the Chairman of the Senate Redistricting Committee, likewise stated, "The interim plans remedy, we believe, the legal flaws found in the federal court in D.C." 2017 Joint Ex. 26.2 at A-5. And the Legislature enacted the court-ordered maps following the Attorney General's advice that "the best way to remedy the violations found by the D.C. court is to adopt the court-drawn interim plans as the State's permanent redistricting maps." C.J.S. App. 432a.

These myriad state officials certainly had a good-faith basis for that belief. After all, it is hard to imagine more persuasive evidence that a map complies with the Constitution and the VRA than a district court order explicitly finding, consistent with this Court's instruction in

Perry, that the map does not incorporate any "plausible legal defects." H.J.S. App. 313a.

But that was not even the only assurance the Legislature had. The Legislature heard corroborating testimony from the Mexican-American Legal Defense and Educational Fund (MALDEF), an organization representing multiple plaintiffs in this case. MALDEF explained how the court-ordered plans "significantly improve[d]" minority voting strength by changing every district in which the D.C. preclearance court had found intentional discrimination under VRA §5 and creating even more majority-minority districts than that court had found necessary to avoid retrogression. *See* C.J.S. App. 436a-439a.

Democratic legislators testified at trial that they had no reason to believe that any member of the 2013 Legislature acted with a discriminatory purpose. Mexican American Legislative Caucus (MALC) Chairman and Representative Rafael Anchia testified that he had no basis to say that any member of the Legislature voted for Plan H358 for a racially discriminatory purpose, or that Chairman Darby or Speaker Straus would engage in racial discrimination. 2017 Trial Tr. 133-34. In fact, Representative Anchia testified that even he did not have any complaints about Plans C235 or H358 when they were enacted. *Id.* at 720-21.

All of that evidence readily suffices to defeat any claim that the Legislature enacted the court-imposed maps into law in a deliberate effort to sort voters on the basis of race, *Miller*, 515 U.S. at 916, or "because of" any "adverse effects" that the plans might have on minority

voters, *Feeney*, 442 U.S. at 279. To the contrary, the record overwhelmingly confirms that the most straightforward answer is the right one: The Legislature adopted the court-ordered interim plans in an effort to enact redistricting plans that complied with the VRA and the Constitution. Accordingly, plaintiffs' intentional-vote-dilution and racial-gerrymandering claims would fail even without reference to the strong "presumption of good faith" that applies in this context, or the "extraordinary caution" federal courts must employ when faced with a claim that a state legislature has engaged in intentional race-based discrimination. *Miller*, 515 U.S. at 916. But with those admonitions, their claims should never have stood a chance.

B. The District Court's "Remove the Taint" Theory of Intentional Discrimination Is Fundamentally Flawed.

Notwithstanding that uncontroverted evidence, the district court reached the remarkable conclusion that the Legislature engaged in intentional discrimination when it adopted as its own the same plans that the court itself *ordered* the State to use in the 2012 elections. The court invalidated two congressional districts and state-house districts in three counties that had been adopted *verbatim* from its own remedial maps—even though the court had expressly considered the very same constitutional and VRA challenges to the very same districts five years earlier and found that they were unlikely to succeed, adequately addressed in the interim plans, or not even "plausible." H.J.S. App. 313a; C.J.S. App. 423a.

Unsurprisingly given the record evidence, the district court did not actually find that the Legislature was predominantly motivated by race when it embraced those districts as its own, or that the Legislature enacted any of those districts for the express purpose of adversely affecting minority voters. The court never even asked what the Legislature's predominant motive was, or whether it embraced any districts because they would harm minority voters. Instead, the court concluded that the Legislature engaged in "intentional discrimination" for a different reason entirely: because it failed to "remove" the purported "discriminatory taint" from the court-imposed plans. C.J.S. App. 46a. In other words, the court concluded that the Legislature engaged in *intentional discrimination* by enacting plans *imposed by the court itself* because those *court-imposed* plans were purportedly infected with *intentional discrimination*. That conclusion suffers multiple legal defects and flunks the commonsense test to boot.

The first fatal problem with the district court's reasoning is that it vitiates the strong "presumption of good faith" and the "extraordinary caution" courts must employ when confronting intentional-vote-dilution and racial-gerrymandering claims. *Miller*, 515 U.S. at 916. The 2013 plans are duly enacted legislation entitled to the same presumption of constitutionality that applies to any other redistricting legislation. That presumption does not disappear just because those were not the first maps the Legislature enacted, or because the district court found the Legislature's previous maps deficient (albeit in an advisory opinion on moot claims, *see infra* pp. 42-44).

That is clear from this Court's repeated admonitions that courts must "afford a reasonable opportunity for *the legislature* to" remedy an invalid law "by adopting a substitute measure," *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (principal op.) (emphasis added), because redistricting is *always* "primarily the duty and responsibility of the State," *Chapman*, 420 U.S. at 27; *see also, e.g.*, *Growe v. Emison*, 507 U.S. 25, 34 (1993). That rule would be meaningless if "remedial" redistricting legislation were treated as presumptively suspect and not entitled to the same presumptions of constitutionality and good faith as any other redistricting legislation.

The district court's task here thus should have remained the same as in any other case alleging racial-gerrymandering and intentional-vote-dilution: to ask whether the plaintiffs proved that the Legislature intentionally sorted voters on the basis of race, *Miller*, 515 U.S. at 916, or enacted the map "because of" its "adverse effects" on minority voters, *Feeney*, 442 U.S. at 279. By instead requiring *the Legislature* to prove that it "removed" purported discriminatory taint from an earlier map, the court not only asked the wrong questions, but reversed the burden of proof entirely.

While that alone is reason to reject the district court's analysis, it is just the first of many problems with requiring the Legislature to prove that it "removed" the purported "discriminatory taint" of earlier legislation. C.J.S. App. 46a. That reasoning suffers from the equally fundamental problem that it is incoherent. It is one thing to ask whether new legislation removes the discriminatory *effects* of previous legislation, for *effects* may be carried

over (wittingly or unwittingly) from one version of a law to another. But it makes no sense whatsoever to ask whether new legislation removes the "taint" of discriminatory *intent* from an earlier enactment. C.J.S. App. 46a.

Outside of cases of express, facial discrimination, discriminatory *intent* is not indelibly ingrained in statutory text or lines on a map. It is a question of *motive* that turns on *why* the legislature enacted the law. The premise of such claims is that a different legislature could permissibly adopt the same legislation without a discriminatory motive. *See, e.g.*, *Palmer v. Thompson*, 403 U.S. 217, 225 (1971) (noting that a law invalidated because of improper motive "would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons"). Thus, when a different legislature adopts a court-drawn map with a different, non-racial motive, any talk of removing taint from the court-drawn plan (or the earlier legislative act on which the court-drawn map was based) is a non sequitur.

That is clear from the very case on which the district court relied in concluding otherwise. *Hunter v. Underwood*, 471 U.S. 222 (1985), involved a statute that had been in effect unchanged for more than 80 years and admittedly had been "motivated by a desire to discriminate against blacks on account of race" when enacted. *Id.* at 233. While the Court invalidated the statute on intentional-discrimination grounds, the Court expressly *reserved* the question of whether the same law "would be valid if enacted today without any impermissible motivation." *Id.* The Court not only viewed itself as reserving, rather than deciding, that question, but did so without

suggesting a need for some kind of exorcism to remove the discriminatory intent of an earlier legislature.[8]

Moreover, the 2013 maps were not only enacted by a different legislature than the 2011 maps, but were adopted after the intervening effort of the three-judge court enforcing this Court's mandate to remedy any constitutional problems. Thus, whatever intentions the 2011 Legislature may have harbored, those intentions cannot plausibly be deemed to have carried over to the plans imposed *by the district court itself* just because those plans did not change each and every aspect of the 2011 plans. Indeed, by that logic, the court itself must have engaged in intentional discrimination when it imposed Plans C235 and H309, as the court was just as guilty of failing to "remove" any lingering "taint" in the 2011 plans as the 2013 Legislature was.

All of that just goes to show the incoherence that results from the district court's approach. Any legal test that leads to the bizarre result that a legislature engaged in *intentional* discrimination by enacting *court-imposed* maps designed to remedy discrimination cannot possibly be right. After all, there must be some way for a legisla-

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[8] The Fifth Circuit cases on which the district court relied do not support its position either. To the contrary, those cases reinforce the conclusion that the only intent that matters is the intent of the legislature that adopts the challenged law. *See, e.g.*, *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998) (finding new version of law comparable to law invalidated in *Hunter* constitutional because, inter alia, legislature did not enact it for a discriminatory purpose).

ture to enact redistricting legislation and end redistricting litigation without getting caught "between the competing hazards of liability" under the multitude of restrictions that govern redistricting. *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion). If adopting a court-imposed interim plan that the court itself declared sufficient to remedy all "plausible legal defects" under either the Constitution or the VRA does not suffice, H.J.S. App. 313a, then it is difficult to imagine what could.

In fact, the district court's opinions tellingly provide no clue as to what the court believed the Legislature could or should have done to remove the supposed "taint" from the court-ordered plans. To the contrary, the court's own analysis confirms that, in its view, there was nothing the 2013 Legislature could do to remove the "taint." There is no better illustration of that once-bitten-forever-damned mentality than the court's analysis of HD90. Unlike any of the other districts from the 2013 maps that the court invalidated, HD90 actually was redrawn by the 2013 Legislature. And the district court expressly held that the plaintiffs' intentional-vote-dilution challenge to the redrawn HD90 "fails because of a lack of discriminatory intent." H.J.S. App. 84a. Yet, even though the court expressly found that the plaintiffs failed to show that the 2013 Legislature engaged in intentional discrimination as to HD90, the court *still* found that HD90 was "tainted" by the purported intentional discrimination of the 2011 Legislature. H.J.S. App. 83a. As that confirms, the district court's "remove-the-taint"

theory not only has no basis in law or logic, but is ultimately impossible for a legislature to satisfy. Thus, just like six years ago, the district court here was determined to impose "independent map[s]" based on its particular view of "the interest of the collective public good." *Perry*, 565 U.S. at 396.

C. The District Court Did Not and Could Not Find Intentional Discrimination on the Basis of Race.

Under a correct application of the correct legal standards, the district court had no basis to conclude that the Legislature engaged in racial gerrymandering or intentional vote dilution when it adopted the court's remedial maps as its own. In concluding otherwise, the court relied principally on its view that the Legislature enacted the court-imposed plans "as part of a litigation strategy," rather than because it had "a change of heart concerning the validity of any of Plaintiffs' claims in either this litigation or the D.C. Court litigation." C.J.S. App. 40a, 41a. That is both factually misguided and legally irrelevant, as it has nothing to do with whether the Legislature sorted voters on the basis of race or intentionally diluted minority voting strength.

At the outset, the district court's characterization of the Legislature is difficult to reconcile with the uncontested evidence that the Legislature adopted the court-ordered plans because it believed that they remedied any valid legal claims. *See supra* p.27. Moreover, to the extent the court sought to attribute impermissible motive to *the Legislature* because *defendants* have defended the 2011 maps in litigation, *see* C.J.S. App. 42a ("Defendants

sought to avoid any liability for the 2011 plans . . . ."), that not only is wrong as matter of fact, but would seem to suggest that the very act of defending allegedly discriminatory legislation would itself constitute discrimination—a result that is not and cannot be the law, and that would raise serious due process concerns if it were.

But more fundamentally, it is not clear how a legislature can endeavor to avoid potential VRA challenges without considering "litigation strategy." Nor is it clear why there is anything remotely sinister, let alone unconstitutional, about a legislature trying to bring existing litigation to an end. A legislature that did not take such considerations into account to any degree, especially in a context as fraught with litigation as redistricting, would be a poor steward of the public interest. There is thus nothing constitutionally suspect about repealing a law that has come under constitutional and statutory attack and replacing it with a law that likely remedies any perceived legal deficiencies and is therefore likely to terminate or at least abbreviate ongoing litigation. To the contrary, that is precisely the kind of conciliatory and resource-saving action that courts (and plaintiffs) should *encourage* legislatures to take. *See, e.g.*, *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1187 (D.C. Cir. 1992) ("passing legislation designed to repair what may have been a constitutionally defective statute . . . represents responsible lawmaking, not manipulation of the judicial process").

And it would make no sense whatsoever to require a legislature to confess the purported error of its past ways—let alone confess the purported error of a *past*

legislature's past ways—before treating the decision to accede to a court-ordered remedy as the conciliatory act that it is. Much litigation settles without an admission of wrongdoing, and forcing a legislature to cry not only "uncle," but "mea culpa," is unrealistic and counterproductive, not to mention legally unfounded.

In all events, even assuming there were something untoward about embracing a court-ordered remedy "as part of a litigation strategy," C.J.S. App. 40a, that has nothing to do with racial gerrymandering or intentional vote dilution. Racial gerrymandering turns on whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916. Intentional vote dilution turns on whether the legislature enacted a particular district because it intended to dilute minority voting strength. *See Shaw v. Reno*, 509 U.S. at 641. A legislature does not act with either of those impermissible race-based motivations just because it enacts a court-ordered remedy out of a desire to end litigation over whether a different legislature acted with impermissible purpose when enacting different legislation.

The district court seemed to think otherwise because it was convinced that the Legislature believed that it had somehow "insulate[d]" the 2013 maps from all legal challenges. C.J.S. App. 41a. That is simply wrong. Defendants do not contend, and have never contended, that the 2013 maps are immune from judicial review. Their contention is that any intentional-discrimination challenges to those maps must be based on the intentions of the

Legislature that enacted them—*i.e.*, the 2013 Legislature, not the 2011 Legislature—and must be judged against the same presumption of good faith, and under the same "predominant motive" and "because of race" standards, that would apply to any other racial-gerrymandering and intentional-vote-dilution claims. It is the district court's failure to abide by those settled legal principles, not its decision to subject the maps to any judicial review at all, with which defendants take issue.

The district court made much the same mistake in placing great weight on the fact that its decision imposing the interim maps was only preliminary. C.J.S. App. 42a. That is certainly correct, as the court could not issue a final ruling on the merits of any claims asserted against the 2011 maps because those maps had not obtained VRA §5 preclearance. Not only were the 2011 maps repealed in 2013, but they never even became law because they were never precleared, and thus "could not cause appellees injury through enforcement or implementation." *Branch v. Smith*, 538 U.S. 254, 284 (2003) (Kennedy, J., concurring); *Connor v. Waller*, 421 U.S. 656, 656 (1975) (per curiam) (holding that challenged acts "are not now and will not be effective as laws until and unless cleared pursuant to § 5").

But the fact that the court's decision was not final is irrelevant to the intentional-discrimination question. Again, defendants are not arguing that plaintiffs' challenges to the 2013 plans are flatly barred through some sort of law-of-the-case or estoppel theory. Defendants simply argue that the motivations of the 2013 Legisla-

ture must be assessed in light of the fact that the Legislature enacted the 2013 plans only after the district court issued a decision explaining in exhaustive detail why it believed that those court-imposed maps remedied all "plausible legal defects" in the 2011 plans. H.J.S. App. 313a. Surely the Legislature could rely in good faith on that decision even though it was preliminary—particularly given that the decision came after the court held two weeks of trial, received explicit instructions from this Court, considered extensive briefing before and after this Court's decision, and heard on remand two additional days of argument from all interested parties.

Finally, the district court truly devolved to absurdity when it criticized the Legislature's "refusal to consider" creating "coalition" districts[9] or violating the Texas Constitution's whole-county provision[10] in certain areas. C.J.S. App. 40a. The court itself rejected the plaintiffs' claims that the Legislature discriminated by failing to create coalition districts because the plaintiffs failed to prove cohesion between African-American and Hispanic

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[9] A "coalition" district is a district in which two or more minority groups must be combined to form a majority of eligible voters. *See, e.g.*, *Perry*, 565 U.S. at 398. A "crossover" district, by contrast, is "one in which minority voters make up less than a majority of the voting-age population" but may nevertheless elect their preferred candidates because enough members of the majority "cross over to support the minority's preferred candidate." *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009).

[10] Tex. Const. art. III, §26.

voters.[11] C.J.S. App. 117a; H.J.S. App. 12a, 26a. And it expressly declined to hold that VRA §2 compelled the Legislature to violate the whole-county provision. *See* H.J.S. App. 50a. The Legislature cannot plausibly have engaged in *intentional discrimination* by declining to draw districts that the court itself concluded were not actually required by the VRA. The court's seeming belief otherwise is at considerable odds with the skepticism this Court has expressed "of a claim that seeks to invalidate a statute based on a legislature's unlawful motive but does so without reference to the content of the legislation enacted." *LULAC v. Perry*, 548 U.S. 399, 418 (2006).

At bottom, the district court reached the wrong result because it asked the wrong question. What matters is not

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[11] This was undoubtedly correct, but the district court's holding that the VRA may require coalition districts is unfounded. *See Perry*, 565 U.S. at 399 ("If the District Court did set out to create a minority coalition district, rather than drawing a district that simply reflected population growth, it had no basis for doing so. Cf. *Bartlett v. Strickland*, 556 U.S. 1, 13–15 (2009) (plurality opinion)."); *Bartlett*, 556 U.S. at 15 ("Nothing in §2 grants special protection to a minority group's right to form political coalitions."). The district court's own opinions confirm that coalition districts present the same practical and constitutional pitfalls that led this Court to hold that VRA §2 does not require crossover districts. *See id.* at 17 (explaining that crossover-district claims "would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions"); *cf.* C.J.S. App. 53a-85a (considering extensive analysis of racial voting patterns by multiple experts to determine political cohesion among African-American and Hispanic voters).

whether the 2013 Legislature "removed the taint" from the court-ordered interim maps before it enacted them as its own, but rather whether the 2013 Legislature enacted those maps in an avowed effort to sort voters on the basis of race, or because they would dilute minority voting strength. Particularly given the strong presumption of good faith, and the extraordinary caution that courts must exercise before concluding that a legislature engaged in intentional discrimination on the basis of race, there is no plausible basis from which a court could conclude on this record that the Legislature engaged in racial gerrymandering or intentional vote dilution when it embraced court-imposed districts as its own.

III. The Court-Imposed Plans Were Not Infected By Any "Taint" Of Intentional Discrimination.

Because the Texas Legislature did not engage in intentional discrimination on the basis of race when it adopted the district court's remedial maps as its own in 2013, the question whether the 2011 Legislature engaged in intentional discrimination when it enacted the long-ago-repealed 2011 maps is both moot and legally irrelevant. That said, there was no intentional discrimination reflected in any district in the court-ordered plans. The district court's interim plans preserved the challenged districts from the 2011 maps because the court recognized then what it should have recognized again in 2017: those districts were not "tainted" with any discrimination in the first place.

A. The District Court Lacked Jurisdiction to Adjudicate Moot Challenges to the 2011 Plans.

The district court's conclusion that the 2013 plans were infected with lingering "taint" in need of "cleansing" rests entirely on advisory opinions that the court had no authority to enter. Article III requires that "an actual controversy . . . be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). And where, as here, a lawsuit challenges the validity of a statute, the controversy ceases to exist if the statute is repealed. *E.g.*, *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). If a challenged statute no longer exists, then absent unusual circumstances not present here there is no cognizable controversy over that law, and any cases challenging it must be dismissed as moot. *See, e.g.*, *Growe*, 507 U.S. at 30; *Burke v. Barnes*, 479 U.S. 361, 363 (1987); *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414-15 (1972) (per curiam).

Applying that settled rule, a unanimous panel of the Fifth Circuit—in an opinion authored by Judge Higginson and joined by Chief Judge Stewart and Judge Jones—held that claims against Texas's 2011 redistricting plans "became moot" when the 2013 Legislature "repealed the 2011 plan and adopted the district court's interim plan in its place." *Davis v. Abbott*, 781 F.3d 207, 220 (5th Cir.), *cert. denied*, 136 S. Ct. 534 (2015). Here, too, as Judge Smith recognized in dissent, plaintiffs' claims against the 2011 plans should have been dismissed as moot once those plans were repealed. C.J.S. App. 336a-349a. In fact, certain Appellees have acknowledged

that "any challenge to the continued use of Plan H283 would be moot." MALC Motion to Dismiss or Affirm 1, *Abbott v. Perez*, No. 17-626 (Nov. 29, 2017).

As explained above, the district court *never* acquired jurisdiction to enter judgment on the merits of the challenges to the 2011 plans because those plans were never precleared. *See supra* p.38. But in all events, those claims certainly should have been dismissed once the Legislature repealed them—a reality that the district court itself acknowledged when it stated that it would "evaluate the discriminatory effect of Plan C185 in terms of its effect on voters *had it been used*." C.J.S. App. 265 n.97 (emphasis added).

The district court did not and could not claim that any exceptions to mootness apply. This does not fall within the voluntary-cessation exception, as the Legislature did not announce its intention to reenact "precisely the same provision" once litigation ends, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), or to replace the 2011 plans with "virtually identical" ones, *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 661 (1993). Just the opposite: the district court found that the Legislature "has repealed the 2011 plans and *does not intend to implement them*." J.A. 64a (emphasis added). Plus, given the presumption of good faith and constitutionality, *e.g.*, *Miller*, 515 U.S. at 916, a government's decision to formally repeal legislation is not viewed with the same "critical eye" for mootness purposes as a private party's mere change in litigation position, *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012).

Finally, the plaintiffs' request for preclearance "bail-in" under VRA §3(c) does not change the analysis. Preclearance is a remedy, not a claim or an injury. The right to a remedy does not arise until the plaintiff prevails on a claim, and thus cannot substitute for Article III injury. *See Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000) ("an interest that is merely a 'by-product' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes"). Accordingly, to seek bail-in, a plaintiff must first prevail on the merits of a constitutional claim that satisfies Article III's case-or-controversy requirement. Here, any threat of injury from the 2011 redistricting plans disappeared when the Legislature repealed them. The plaintiffs' request that the district court reimpose preclearance on the State under VRA §3(c) thus could not keep their moot challenges to the repealed 2011 plans alive. It could hardly be otherwise: bail-in is a remedy that, if ordered, subjects a state to special rules that undermine its sovereignty; litigation to determine whether bail-in is appropriate would be question-begging if the litigation itself subjected a state to special rules that undermined its sovereignty.

In sum, the district court never had jurisdiction to force the State to spend four years defending legislation that was repealed in 2013. Its insistence on doing so was just part and parcel of the court's erroneous and incoherent effort to saddle the State with the burden of proving that the court's own interim maps removed any lingering "taint of discriminatory intent."

B. The Court-Imposed Maps Were Not "Tainted" by Intentional Discrimination.

Even setting aside the jurisdictional problem, the district court's conclusions regarding the invalidated districts that were also in the 2011 plans are simply wrong. Indeed, the district court itself correctly rejected all of those claims in 2012 when it incorporated those districts in the interim plans, and the majority should have followed Judge Smith's lead in doing so again in 2017.

1. CD35 Is Not and Never Was a Racial Gerrymander.

To prevail on a racial-gerrymandering claim, the plaintiff must prove that race was "the 'predominant factor' motivating the legislature's districting decision." *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999). If race is proven to be the predominant motive, then strict scrutiny applies. *Cooper*, 137 S. Ct. at 1464. The State satisfies strict scrutiny if it had a "strong basis in evidence" to believe that the VRA required it to draw an additional minority opportunity district. *Id.* "[T]he requisite strong basis in evidence exists when the legislature has '*good reasons* to believe' it must use race in order to satisfy the Voting Rights Act." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 801 (2015) (quoting *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015)).

Of course, the plaintiffs' racial-gerrymandering challenge to CD35 fails at the outset because "the 2013 Legislature did not draw the challenged districts in Plan C235." C.J.S. App. 34a; *id.* at 115a-116a ("There is no evidence that the Legislature again considered in 2013

which persons to include within CD35 . . . ."). But even assuming for the sake of argument that race predominated when the *2011 Legislature* drew CD35, both its decision to draw CD35 and the 2013 Legislature's decision to enact a court-ordered plan that retained CD35 would readily survive strict-scrutiny review. The 2013 Legislature had the best possible basis to believe that retaining CD35 was necessary to comply with VRA §2: The district court itself concluded as much in 2012. C.J.S. App. 423a.

CD35 is a Hispanic-opportunity district that runs along the Interstate-35 growth corridor between Austin and San Antonio. The configuration of the district was proposed by MALDEF, C.J.S. Supp. App. 315a, and supported by the Texas Latino Redistricting Task Force plaintiffs, C.J.S. App. 174a, based on their position (not disputed by any plaintiff) that VRA §2 requires seven Hispanic-opportunity districts in south and west Texas, *see* Mot. to Dismiss or Affirm 30, *Abbott v. Perez*, No. 17-586 (Nov. 20, 2017). Democratic politicians also supported creating a Hispanic-opportunity district connecting Austin with San Antonio. Among others, former Texas Senators Gonzalo Barrientos and Joe Bernal testified that CD35 "connects communities of interest," C.J.S. Supp. App. 321a, and that "people in those parts of San Antonio [covered by CD35] have more in common with people in southeast Austin than with people in more affluent areas of San Antonio such as Alamo Heights (in CD21)." *Id.*

After considering the plaintiffs' claims in 2012, the district court explained that Plan C235 sufficiently ad-

dressed the plaintiffs' claim that VRA §2 required "7 Latino opportunity districts in South/Central/West Texas" by including seven such districts—one of which was CD35. C.J.S. App. 423a. The court also acknowledged that the Legislature had good reasons to create a new district along the Interstate-35 growth corridor, finding it "undisputed that much of Texas's overall population growth occurred in Bexar County and Travis County and areas along the I-35 corridor." C.J.S. App. 408a; *see also* Joel Kotkin, *America's Next Great Metropolis Is Taking Shape In Texas*, Forbes (Oct. 13, 2016), https://perma.cc/VLM7-KMV8 (noting that the I-35 corridor "is expanding more rapidly than any other in the nation," and that "no regional economy . . . has more momentum than the one that straddles the 74 miles between San Antonio and Austin").

The district court nevertheless found in 2017 that CD35 was racially gerrymandered, reasoning that because there is no racial bloc voting in Travis County (part, but not all, of which is included in CD35), VRA §2 could not require the Legislature to include any part of Travis County in a minority-opportunity district. C.J.S. App. 176a-177a.[12] That conclusion cannot be reconciled

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[12] The district court noted that CD35 included territory in Travis County that had been in the former CD25, a crossover district. But the court did not find vote dilution based on the elimination of a preexisting crossover district. *See* C.J.S. App. 110a n.83. Nor could it have, as most of the Travis County Hispanic population in the previous crossover district was placed in CD35, a new Hispanic-opportunity district, so this population could not possibly have suffered vote dilution.

with this Court's precedent, which required the district court to consider the *entire* territory covered by CD35 *as drawn* rather than a specific county, part of which is not in the district at issue. *See Bethune-Hill*, 137 S. Ct. at 800 ("The ultimate object of the inquiry . . . is . . . the district as a whole."). Moreover, strict scrutiny does not require a showing that the VRA *in fact* required the Legislature to create the district exactly as drawn; instead, it is enough that the Legislature had "good reasons" to believe that the VRA required it. *Cooper*, 137 S. Ct. at 1464.

Here, the district court itself concluded in 2012 that the creation of CD35 as a minority-opportunity district was necessary to address the Task Force plaintiffs' VRA §2 claims. *See* C.J.S. App. 409a, 415a, 423a. If the district court had "good reasons" to believe that CD35 needed to be drawn as a minority-opportunity district to address potential VRA §2 claims, then surely the Legislature did too. If a Legislature cannot maintain a minority-opportunity district even when a federal court has expressly concluded that doing so is necessary to remedy a potential VRA §2 violation, then States would be left without the "breathing room" to which this Court's precedent and the Constitution entitles them. *Cooper*, 137 S. Ct. at 1464 (quoting *Bethune-Hill*, 137 S. Ct. at 802).

2. There Is Not and Never Was Intentional Vote Dilution In CD27.

a. The district court's ruling that CD27 was the product of intentional vote dilution is equally flawed. As explained, *see supra* p.25, to establish intentional vote dilution, a plaintiff must establish not only discriminatory

intent, but discriminatory vote-dilutive effect. *E.g.*, *Shaw v. Reno*, 509 U.S. at 641. After all, a legislature's "motivations" alone cannot "violate equal protection." *Palmer*, 403 U.S. at 224. And to establish the effects prong of an intentional-vote-dilution claim, a plaintiff must prove that there is "the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of [the minority group's] choice." *LULAC*, 548 U.S. at 430 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994)). For VRA §2 purposes, "a sufficiently large minority population" means a minority population of at least 50%. *Bartlett*, 556 U.S. at 19.[13]

The district court in 2017 correctly found that CD27 does "not diminish Hispanic voter opportunity for § 2 effects purposes" because "no additional compact Latino opportunity district could be drawn" in the region. C.J.S. App. 113a. And the court correctly rejected the notion that "any voter with a § 2 right must be placed into a § 2 district, or that Nueces County Hispanics would have had a right to be included in a Latino opportunity district under any circumstances." *Id.* at 112a n.85; *see Shaw v. Hunt*, 517 U.S. 899, 917 n.9 (1996). Those findings suffice

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[13] A group that cannot meet the 50% threshold cannot establish a vote-dilution effect because it is not sufficiently large to "elect representatives of [its] choice," 52 U.S.C. §10301(b). So any claim of unconstitutional racial discrimination against a group too small to form a majority would necessarily be a racial-gerrymandering claim, requiring proof that race predominated in placing the group within a particular district, *Bethune-Hill*, 137 S. Ct. at 799.

to establish that Plan C235 did not dilute Hispanic voting strength in this region—in other words, that there was no vote dilution.

The district court nevertheless held that the 2013 Legislature did not "substantially address" the VRA §2 challenges to CD27 because it "impermissibly trad[ed] the § 2 rights of Nueces County Hispanic voters for those in Travis County, who lacked a § 2 right to a Latino opportunity district." C.J.S. App. 112a. That conclusion has no basis in fact or law. There is no evidence that the 2011 Legislature had Travis County (or the separately challenged CD35 including part of Travis County) in mind when it configured CD27, much less that it intentionally "traded" voting rights between the districts.

The district court's contrary conclusion rests on a false analogy to *LULAC v. Perry*, 548 U.S. at 429-30, which held that a State cannot offset the loss of a majority-minority district required by VRA §2 by creating a *noncompact* majority-minority district elsewhere in the State. C.J.S. App. 180a-181a. But this case does not involve "trading" a compact majority-minority district for a noncompact one. To the contrary, both the 2011 plan and the 2013 plan undisputedly *increased* the number of Hispanic-opportunity districts in South and West Texas from six to seven by adding CD35, and maintained the existing Hispanic-opportunity district based in Cameron County (formerly CD27, renamed CD34). *See Texas*, 887 F. Supp. 2d at 153 (explaining that CD34 offset changes to CD27 for purposes of VRA §5 retrogression). The Legislature did not "trade" Nueces County Hispanics'

VRA §2 voting rights at all—as the district court correctly recognized when it rejected this exact same theory in 2012. *See* C.J.S. App. 421a & n.106. Nothing has changed since then.

b. In all events, the plaintiffs produced no evidence that the Legislature configured CD27 "'because of,' not merely 'in spite of,' its adverse effects upon" Hispanic voters in Nueces County. *Feeney*, 442 U.S. at 279. The 2011 Legislature configured CD27 based on specific, race-neutral requests to make Corpus Christi in Nueces County (2010 Census population: 305,215[14]) the anchor of a congressional district separate from Brownsville in Cameron County (2010 Census population: 175,023[15]), two major cities over 160 miles apart with competing ports and different media markets. *See* C.J.S. Supp. App. 288a-291a. Before 2011, CD27 included both cities, as it stretched from Nueces County south to include Cameron County in the Rio Grande Valley.

In hearings held before the 2011 legislative session, voters and political leaders in Nueces County expressed their desire for a Nueces County-anchored district that included the coastal counties to the north; similarly, voters and political leaders in the Rio Grande Valley wanted a congressional district anchored in Cameron County. *See, e.g.*, *id.*; 2014 Ex. D-574. Multiple legislators also

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[14] *See* U.S. Census Bureau, QuickFacts, Corpus Christi, Texas, https://www.census.gov/quickfacts/fact/table/corpuschristicitytexas/PST045216.

[15] *See* U.S. Census Bureau, QuickFacts, Brownsville, Texas, https://www.census.gov/quickfacts/fact/table/brownsvillecitytexas/PST045216.

supported separating Nueces and Cameron Counties so that the Rio Grande Valley would get an additional congressional seat. *See* Aug. 2014 Trial Tr. 1076-77; *id.* at 444-45; 2014 Ex. D-607; 2014 Ex. D-574 at 79. Following this input, the 2011 Legislature created separate congressional districts anchored by Nueces and Cameron Counties. CD34—a Hispanic-opportunity district anchored in Cameron County—provided voters in the Rio Grande Valley with the opportunity to elect an additional member. CD27, anchored in Nueces County, included the incumbent congressman's residence and coastal counties to the north. C.J.S. Supp. App. 295a-296a.

The district court dismissed this substantial and uncontroverted evidence as playing only "a small role" in the creation of CD27, C.J.S. App. 193a, and concluded that the 2011 Legislature's true motive was to dilute Hispanic voting strength. The court reasoned that Nueces County Hispanic voters "were intentionally deprived of their right to elect candidates of their choice," C.J.S. App. 112a, merely because the 2011 Legislature was aware that CD27 would likely be a Republican-leaning district and that most Hispanic voters in Nueces County were not Republicans. That is wrong as a matter of law. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences." *Feeney*, 442 U.S. at 279. To treat mere awareness that Hispanic voters will be placed in a Republican-leaning district as sufficient to establish intentional discrimination on the basis of race would lead to the absurd result that the Texas Legislature can *never* knowingly place Hispanic voters in a Republican-leaning district.

In any case, placing Nueces County Hispanic voters in CD27 makes little sense as a vote-dilution strategy. With or without Nueces County voters, it is not possible to create more than seven Hispanic-opportunity districts in the region. C.J.S. App. 113a. So a nefarious map-drawer would have *packed* Hispanic voters into those majority-minority districts—rather than place them in a separate district like CD27. Likewise, the district court's conclusion that the Legislature "chose to put [Nueces County Hispanic] voters" in CD27 "to protect an incumbent who was not the candidate of choice of those Latino voters," *id.* at 191a, is illogical. If anything, incumbent protection would be a reason to *exclude* voters unlikely to support the incumbent. *See, e.g.*, *LULAC*, 548 U.S. at 441. But the Legislature did just the opposite in CD27.

The only explanation that accounts for the Legislature's decision to include all of Nueces County in CD27, as opposed to a small portion around the incumbent's residence, is that the Legislature wanted to keep Nueces County whole as the anchor of a congressional district. That purpose is permissible, race-neutral, and fully supported by the record. There is not a shred of evidence that the 2011 Legislature placed Nueces County in CD27 because it intended to disadvantage Hispanic voters—let alone sufficient evidence to overcome the presumption of good faith.

3. The Legislature Did Not Engage in Intentional Vote Dilution in Bell County (HD54).

a. Much like with CD27, the plaintiffs' intentional-vote-dilution challenges to the state-house districts in Bell County fail at the outset because there concededly

is no vote-dilutive effect. It is undisputed that a "majority-minority-CVAP" district *cannot* be drawn in Bell County. H.J.S. App. 180a. The district court thus correctly found that there is "no § 2 results violation" in Bell County. H.J.S. App. 18a. That should have ended the intentional-vote-dilution-inquiry too. *See Shaw v. Reno*, 509 U.S. at 641.

b. Regardless, there was no basis for the court to find intentional discrimination either, as the 2011 Legislature plainly drew the Bell County state-house districts with incumbency and "partisan advantage," not race, in mind. *See* H.J.S. App. 278a (Smith, J., dissenting). Before 2011, HD54 contained all of Burnet County, all of Lampasas County, and a small portion of western Bell County that included almost all of the City of Killeen, where incumbent Republican Representative Aycock lived. HD55 included the rest of Bell County, including its eastern cities of Temple and Belton. Due to population growth, however, HD54 could no longer include both Burnet County and Lampasas County. H.J.S. Supp. App. 277a-278a. HD54 would have to jettison Burnet County—the more populous of the counties—to keep western Bell County and Representative Aycock's home in the district. July 2014 Trial Tr. 1727.

Losing "heavily Republican" Burnet County created political risk for Representative Aycock, who was therefore "anxious to gain Republican strength and looked for places that could be done." H.J.S. Supp. App. 278a. He and his colleague from HD55 accordingly reached a compromise whereby HD54 would take from HD55 the Village of Salado in south-central Bell County, a Republican

stronghold, to shore up HD54 and Representative Aycock's incumbency. *Id.* That undisputed motivation behind HD54 precludes any finding of intentional race-based discrimination, as districting to protect incumbents is a race-neutral explanation, "even if it so happens that the most loyal Democrats happen to be [minorities] and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. at 551.

The district court clearly erred in concluding otherwise. The court complained that a small part of the City of Killeen, which happened to include some minority voters, was moved from HD54 to HD55. H.J.S. App. 21a-22a. But dividing Killeen was necessary to keep Lampasas County in HD54, and given Killeen's very diverse and integrated population, dividing the city in *any* way would incidentally affect some minority voters. *Id.* at 15a. The court also faulted Representative Aycock for objecting to "plans . . . (such as Plan H202 and Plan H232) that would have kept the City of Killeen more whole in one district." *Id.* at 182a. But the substantial and unrebutted evidence showed that Representative Aycock declined to support those plans because he wanted to preserve his incumbency and maintain his relationship with constituents in Lampasas County. July 2014 Trial Tr. 1744, 1769-70.

In any event, the court itself found that "the Legislature's intentional failure to create the proposed districts was not intentional vote dilution," H.J.S. App. 18a, so it is hard to see how failure to support those proposals could amount to intentional discrimination. In short, there is no evidence that Representative Aycock, let

alone the Legislature as a whole, had the specific purpose of harming minority voters when drawing HD54.

c. The district court also erred in concluding that the 2011 Legislature engaged in invidious vote dilution under the one-person, one-vote doctrine because it failed to justify a minor 3.32% population deviation between HD54 and HD55. *Id.* at 269a. That conclusion is contrary both to this Court's one-person, one-vote doctrine and to the record (and, in any event, cannot be attributed to the 2013 Legislature).

First, the district court cited no authority for its apparent view that a one-person, one-vote violation may be found based on the deviation between two specific districts, as opposed to the maximum deviation among all districts in a statewide plan. Relying on *Brown v. Thomson*, 462 U.S. 835, 842 (1983), the court posited that "the geographic scope of a one person, one vote claim . . . is whatever the plaintiff makes it." H.J.S. App. 224a. But *Brown* does not stand for the proposition that plaintiffs may base one-person, one-vote claims on *de minimis* deviations in discrete geographic areas. To the contrary, *Brown* simply establishes that a statewide plan may be challenged when one district drastically deviates (there, by more than 60%) from the statewide average. 462 U.S. at 846. *Brown* thus provides no support for the district court's radical conclusion that States must justify any deviation in any district, no matter how small.

More importantly, this Court has never found a one-person, one-vote violation in a *state*-legislative redistricting plan based on a deviation as small as the 3.32% devi-

ation here. As a general rule, "a maximum population deviation under 10%" constitutes a "minor" deviation insufficient to "make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1307 (2016).[16] "[T]hose attacking a state-approved plan must [therefore] show that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors." *Id.* Because it is the challenger's burden to prove illegitimate factors predominated—not the State's burden to prove otherwise—"attacks on deviations under 10% will succeed only rarely, in unusual cases." *Id.*

Rather than require plaintiffs to demonstrate that the *de minimis* 3.32% deviation they identified between two districts was the product of illegitimate factors, the district court faulted the Legislature for purportedly "assum[ing] they could have a 10% deviation *without justification*." H.J.S. App. 240a. According to the district court, "deviations may exist, but they must be justified by the right reasons." *Id.* at 241a. The court then set out to "analyze whether the population deviations in Plan H283 are explained by legitimate legislative policies in ways that justify the challenged deviations," *id.* at 199a, and faulted the State because statewide "population deviations were intentionally not minimized beyond 10%,

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[16] In contrast, *congressional* plans are held to a stricter standard of near-perfect population equalization under the one-person, one-vote doctrine. *E.g.*, *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016).

and were not explained or justified on the legislative record during the session." *Id.* at 238a.

That reasoning is flatly contrary to this Court's admonition that *plaintiffs* bear the burden of proving "that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors," and that "attacks on deviations under 10% will succeed only rarely, in unusual cases," *Harris*, 136 S. Ct. at 1307. As *Brown* and *Harris* make clear, it was *the plaintiffs'* burden to prove that the *de minimis* 3.32% deviation between two districts was the product of *illegitimate* reasons, not *the Legislature's* burden to prove that it was the product of *legitimate* ones. And as already explained, *see supra* pp.54-55, the plaintiffs plainly failed to meet that burden.

4. The Legislature Did Not Intentionally Dilute Hispanic Voting Strength in Dallas County (HD103, HD104, and HD105).

a. As with their other intentional-vote-dilution claims, the district court should have rejected the plaintiffs' intentional-vote-dilution claims in three west Dallas County districts—HD103, HD104, and HD105—for the straightforward reason that there was no vote-dilutive effect. Although the parties disputed many factual issues, one thing was certain: it was *not* possible to draw additional majority-minority districts in Dallas County—even with the data available at the time of trial in July 2017, more than four years after the Legislature

adopted Plan H358.[17] MALC's own expert expressly conceded this point. 2017 Trial Tr. 48. Moreover, the plaintiffs failed to prove even that additional *coalition* districts—which are not required by VRA §2—could be drawn in Dallas County. H.J.S. App. 26a (finding lack of political cohesion). Without "the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of [the minority group's] choice," *LULAC*, 548 U.S. at 430 (quoting *De Grandy*, 512 U.S. at 1008), there can be no vote dilution. *See Shaw v. Reno*, 509 U.S. at 641.

b. Regardless of the absence of a vote-dilution effect, there is absolutely no evidence that the 2011 Legislature intentionally discriminated when it drew HD105. As a result of the 2010 Census, the 2011 Legislature faced the difficult task of removing two Republican districts (one of which was HD106) from Dallas County without eliminating any existing minority-opportunity districts. H.J.S. Supp. App. 222a. To give HD106's incumbent, Representative Anderson, a chance to retain his seat, the Legislature decided to extend nearby Republican HD105 significantly southward into what otherwise would be HD104 to include Anderson's home. *Id.* at 229a-230a. This allowed Anderson to run against

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[17] HD104 is a majority-Hispanic district. H.J.S. App. 167a. HD103 was not a majority-Hispanic district, but it was electing the Hispanic-preferred candidate, Representative Rafael Anchia. *Id.* at 170a.

HD105's Republican incumbent, Representative Harper-Brown, in a relatively safe Republican district. *Id.*; J.A. 454a.

The district court tried to portray this incumbency-protection decision in a negative light, claiming that "mapdrawers improperly used race to make HD103 and HD104 more Hispanic and HD105 more Anglo." H.J.S. App. 23a.[18] But that makes no sense as a theory of vote dilution. As the legislative staff member who drew HD105 explained, he ensured that areas with significant Hispanic voting population were kept in HD104, thus maintaining HD104 as a minority-opportunity district with a Spanish-surname-voter-registration above 50%. He conducted a similar exercise to keep the Spanish-surname-voter-registration of HD103 around its benchmark level of 39%. H.J.S. Supp. App. 227a-229a. Moving Hispanic voters from HD105 to HD103 and HD104 placed them in districts where, unlike in HD105, they were likely to be represented by Hispanic candidates of choice. *Id.* at 222a, 230a. That is the opposite of minority vote dilution.

5. The Legislature Did Not Intentionally Dilute Hispanic Voting Strength in Nueces County (HD32 and HD34).

a. There is not and never was any intentional vote dilution in the state-house districts in Nueces County. As

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[18] Although the district court seemed to focus on the use of racial data, it did not find racial gerrymandering, nor could it—the plaintiffs did not even plead claims of racial gerrymandering in Dallas County. H.J.S. App. 192a-193a.

an initial matter, there could not have been intentional vote dilution in Nueces County because, once again, there was no vote-dilution effect. *See infra* Part IV.A.

b. Regardless, the record is devoid of any evidence of intent to dilute minority voting strength. Under the plan that existed in 2010, Nueces County contained two Texas House Districts (HD33 and HD34) and part of a third (HD32), all of which were represented by Republicans. H.J.S. Supp. App. 89a-91a. Based on the 2010 Census, a relative decline in population entitled the county to only two Texas House districts. *See* H.J.S. App. 27a. Consequently, as required by the Texas Constitution's whole-county provision, Tex. Const. art. III, §26, the 2011 Legislature apportioned two Texas House districts to Nueces County (HD32 and HD34). *See* H.J.S. App. 27a. One of those (HD34) was drawn as a Hispanic-opportunity district. *Id.* at 57a. That ensured roughly proportional representation, as Hispanic voters "are around 56% of the relevant population (CVAP)" in Nueces County. *Id.* at 51a. The other district (HD32) replaced the two previous Republican districts with one protecting the most senior incumbent of the delegation. *See* H.J.S. Supp. App. 100a (noting seniority).

The district court nonetheless found both intentional vote dilution and a vote-dilution effect in Nueces County because the Legislature did not draw "an additional compact minority district," H.J.S. App. 54a—that is, "two HCVAP-majority districts wholly within Nueces County," *id.* at 59a. This was clear legal and factual error, as there was no possible way to draw two performing

majority-minority districts in Nueces County. *See infra* Part IV.A. To state the obvious, the Legislature did not engage in intentional discrimination by declining to do the impossible—particularly given that, had the Legislature actually split the county's Hispanic population in half, it undoubtedly would have been charged with vote dilution.

The district court did not and could not explain how this decision amounted to intentional vote dilution. Instead, it rested its intentional-discrimination finding largely on a meritless one-person, one-vote argument that was expressly disclaimed by MALC, the only plaintiff asserting claims against the Nueces County statehouse districts. *See* 2017 Trial Tr. 22; H.J.S. App. 30a, 31a n.21. Just like in Bell County, the court found a one-person, one-vote violation in Nueces County based on a minor deviation between two specific districts—a mere 3.63% deviation between HD32 (0.34% below the statewide ideal) and HD34 (3.29% above the statewide ideal). *Id.* at 254a. As explained above, that alone was legal error because (1) it was not a statewide maximum-deviation analysis; (2) it is the plaintiffs' burden to prove that such minor deviations are illegitimate, *see Harris*, 136 S. Ct. at 1307; and (3) "attacks on deviations under 10% will succeed only rarely, in unusual cases," *id.* *See supra* pp.55-58.

But even setting those problems aside, the district court clearly erred when it assumed that the 2011 Legislature must have invidiously relied on racial data merely

because "HD34 is significantly more Hispanic in population and significantly more overpopulated than HD32." H.J.S. App. 255a. First, a deviation of less than 4% is hardly "significantly more overpopulated." Second, a court may not assume invidious intent from the mere existence of disparate result. *See Feeney*, 442 U.S. at 279. Instead, it was the plaintiffs' burden to rebut the presumption of good faith, and prove up their counter-intuitive claim that *removing* two of the three Republican representatives from Nueces County and *adding* a performing Hispanic-opportunity district somehow amounted to intentional vote dilution. That, the plaintiffs utterly failed to do.

* * *

In sum, the court-ordered districts later invalidated by the district court were preserved in the court's own 2012 remedial maps for an obvious reason: those districts were not infected with any discriminatory "taint" to begin with. The court itself found as much back in 2012, as it was bound to do given this Court's mandate to "draw interim maps that do not violate the Constitution or the Voting Rights Act." *Perry*, 565 U.S. at 396. Accordingly, even if the intentions of the 2011 Legislature were relevant, they supply no basis whatsoever for invalidating any of the districts that the 2013 Legislature adopted verbatim from the district court's interim maps.

IV. The Two Remaining Challenges To The 2013 Plans Are Meritless.

The conclusion that the Legislature did not engage in intentional discrimination when it adopted the district

court's interim maps as its own suffices to invalidate the bulk of the district court's holdings, as all but one of the districts the court invalidated were adopted verbatim from the court-imposed maps, and each of those districts was invalidated on intentional-discrimination grounds. But the district court invalidated two state-house districts on grounds that are not controlled by that analysis, finding a VRA §2 results violation based on a vote-dilution *effect* in one district (HD32 in Nueces County), and finding racial gerrymandering in the lone invalidated district that was *not* adopted verbatim from the court-ordered plan (HD90 in Tarrant County). While defendants certainly concede (contrary to the district court's claims) that the 2013 plans were not "insulated" from attack on those grounds, each of those holdings is legally and factually unsustainable.

A. There Is No Vote-Dilutive Effect in Nueces County State-House Districts.

The district court's 2017 orders sustained only one *effects* claim in the entirety of the 2013 maps, finding vote-dilutive effect in HD32 in Nueces County. The district court correctly rejected that very same claim in 2012, H.J.S. App. 303a, and the majority should have joined Judge Smith in doing so again in 2017, *id.* at 298a.

As discussed, *see supra* pp.48-49, to establish a vote-dilution effect under VRA §2, a plaintiff must establish "the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of [the minority group's] choice." *LULAC*, 548 U.S. at 430 (quoting

De Grandy, 512 U.S. at 1008). To qualify as "sufficiently large" for the VRA to require the district, the minority population must be at least 50%, *Bartlett*, 556 U.S. at 19, but it must also be large enough to actually perform and provide minority voters with the opportunity to elect their preferred candidates. *See, e.g.*, *LULAC*, 548 U.S. at 428 (noting that "it may be possible for a citizen voting-age majority to lack real electoral opportunity").

The district court itself recognized that it was not possible to draw two state-house districts in 56% Hispanic Nueces County with enough Hispanic voters to consistently elect Hispanic candidates of choice. Plaintiffs' attempt to draw two Hispanic-citizen-voting-age-majority districts in Nueces County left Hispanic voters "essentially worse off than under Plan H358 because one district would not perform at all and one performed poorly (compared to Plan H358, where one district does perform consistently for Latinos)." H.J.S. App. 49a-50a; *id.* at 55a (explaining that plaintiff MALC's effort produced "two HCVAP-majority districts that are poorly performing or not yet performing").

MALC's own expert testified that he could not "draw two districts wholly contained within Nueces County that were Latino CVAP majorities and . . . both performed for the Latino community." J.A. 387a. As he explained, when he attempted to draw two districts wholly within Nueces County with at least 50% Hispanic-citizen-voting-age population, one district elected the minority-preferred candidate in only 7 of 35 elections analyzed, and the other in none. J.A. 386a-387a; *see also, e.g.*,

H.J.S. Supp. App. 93a (noting Texas Legislative Council attorney David Hanna's conclusion in 2011 that it was "highly unlikely that you can ever get two performing districts for Hispanics no matter how you draw them"); *id.* at 94a-95a (suggesting drawing one "clearly performing" Hispanic-opportunity district in Nueces County to avoid retrogression).

That evidence confirms that creating two districts within Nueces County with at least 50% Hispanic-citizen-voting-age-population would not have created an opportunity to elect the minority-preferred candidate in two districts. To the contrary, it would result in levels of performance for Hispanic-preferred candidates "so low as to indicate a lack of real electoral opportunity in both districts." H.J.S. App. 44a. Accordingly, not only did VRA §2 not require two such districts; if the State had tried to draw them, it undoubtedly would have been charged with vote dilution. *See id.* at 96a ("[A] 50% HCVAP district is theoretically an opportunity district, but it may still be challenged by Plaintiffs as not providing real electoral opportunity."). And the district court expressly rejected the plaintiffs' claim that VRA §2 required the Legislature to violate the whole-county provision to create an additional Hispanic-opportunity district. *Id.* at 49a-50a, 59a ("[B]reaking the County Line Rule twice to remove Anglos and incorporate even more Hispanics to improve electoral outcomes goes beyond what § 2 requires."). That should have been the end of the inquiry.

Instead, the district court concluded that the Legislature violated §2 by failing to draw two Hispanic-majority districts within Nueces County—despite the undisputed evidence submitted by MALC itself that such districts would not perform for Hispanic voters—on the theory that MALC failed to prove "that the districts in [its demonstration plan] *do not* provide real electoral opportunity." H.J.S. App. 55a (emphasis added). That conclusion is inexplicable. It was MALC's burden to prove that two such districts *would* perform, but MALC conceded that they would not. The Legislature cannot plausibly be found to have caused vote dilution by failing to draw districts that MALC *agreed* would have provided *less opportunity* to elect Hispanic-preferred candidates than the districts in Plan H358.

The district court's error is confirmed by evidence showing that state-house districts in Nueces County do not dilute Hispanic voting strength. Because the existing districts provide proportional representation, the district court itself recognized that "[c]reating a second [opportunity] district would result in over-representation [of Hispanic voters] in Nueces County." *Id.* at 51a. And it expressly found that "Hispanics are being elected to countywide offices and as house district representatives, indicating a lack of barriers to candidacy and election." *Id.* at 55a, *see also, e.g.*, H.J.S. Supp. App. 111a ("There have been a significant number of Latinos in elected office in Nueces County. Three of eight Corpus Christi council members are Hispanic, as are the county attor-

ney, Nueces County district clerk, and three of eight district court judges." (citations omitted)). The district court's own findings thus confirm that the configuration of Nueces County House districts does not dilute Hispanic voting strength.

B. The Legislature Did Not Engage in Unconstitutional Racial Gerrymandering in Reconfiguring Tarrant County's HD90.

Remarkably, the district court not only accused the Legislature of engaging in intentional discrimination by *failing* to change the districts that the court itself imposed, but also managed to conclude that the Legislature engaged in racial gerrymandering in one of the very few districts that it *did* change. That conclusion perfectly illustrates the dilemma that state legislatures face when they attempt to balance the competing demands of the VRA and the Equal Protection Clause. The district court in 2012 adopted the previous version of HD90 as a majority-Hispanic district; the 2013 Legislature drew the reconfigured 2013 version as a majority-Hispanic district; and plaintiffs in this lawsuit told the Legislature (both in 2011 and 2013) that HD90 had to be retained as a majority-Hispanic district. Yet the district court held that the Legislature did not even have "good reasons" for retaining HD90 as a majority-Hispanic district.

That conclusion is impossible to reconcile with this Court's precedent. Contrary to the district court's contentions, "avoid[ing] a potential VRA problem" is not just "a vague goal" that fails to provide the "strong basis in evidence" to believe "that the VRA require[s] [the] use

of race." H.J.S. App. 81a. Instead, this Court has repeatedly recognized that "complying with operative provisions of the Voting Rights Act" is a sufficiently "compelling interest" to justify a decision to redistrict on the basis of race. *Cooper*, 137 S. Ct. at 1464 (citing *Shaw v. Hunt*, 517 U.S. at 915); *see Bethune-Hill*, 137 S. Ct. at 801; *Alabama*, 135 S. Ct. at 1272-74. And the State had the strongest of "'good reasons' to think that it would transgress the [VRA] if it did *not* draw race-based district lines" by maintaining HD90 as a majority-Hispanic district, *Cooper*, 137 S. Ct. at 1464 (quoting *Bethune-Hill*, 137 S. Ct. at 802), as the plaintiffs consistently argued that this was the case.

In 2011, MALDEF urged the Legislature to increase the Hispanic-citizen-voting-age-population and Spanish-surname-voter-registration in HD90 because it was possible to create "a clear Latino CVAP majority district" in Tarrant County. H.J.S. Supp. App. 258a-259a. The 2011 Legislature accommodated the request, raising the Spanish-surname-voter-registration of HD90 to just over 50%—in part by moving the predominantly African-American neighborhood of Como into an adjoining Republican district. H.J.S. App. 68a, 174a. And the 2011 Legislature was very clear as to why it did so: MALDEF "testified that [Spanish-surname-voter-registration] needed to be above 50%." H.J.S. Supp. App. 264a. Because Como had been part of the district since 1978, however, the 2013 Legislature wanted to honor Como's request to be moved back into HD90—a request also made by the Democratic incumbent (and MALC member),

Representative Burnam. H.J.S. App. 71a-72a, 75a, 77a. So in 2013, the Legislature sought to reconfigure HD90 from the 2012 court-imposed version to accomplish two goals: (1) moving the predominantly African-American neighborhood of Como back into HD90 as it requested, and (2) keeping HD90 as a majority-Hispanic district to comply with VRA §2.

Moving Como back into HD90 created a potential problem, however, because it would decrease the district's Spanish-surname-voter-registration from approximately 51% to 48.2%. J.A. 399a. And when Representative Burnam's chief of staff presented a proposed map that would do just that, MALC's counsel expressly informed him that MALC could not "support a map that brought the SSVR below 50 percent" because that would "substantially dilute[] Hispanic voting power." J.A. 398a, 403a. That concern was well-founded, as an elected official from the area stated that even with 50% Spanish-surname-voter-registration, it was far from clear that Hispanic voters would be able to nominate their preferred candidate in the Democratic primary. 2017 Trial Tr. 317. In 2012, incumbent Representative Burnam—who was not the Hispanic candidate of choice, H.J.S. App. 69a n.45—staved off a primary challenge from Carlos Vasquez by 159 votes, even though Spanish-surname-voter-registration was *above* 50%, *id.* at 72a. And, in 2014, challenger Ramon Romero, Jr., defeated Burnam in the primary by only 110 votes. *Id.* at 76a. So lowering Spanish-surname-voter-registration by only a few points

could make all the difference for Hispanic voters in HD90.

Having heard MALC's legal concerns, Burnam instructed his chief of staff to draw a map that returned Como to HD90 but also kept the district's Spanish-surname-voter-registration above 50%. H.J.S. App. 72a-73a; J.A. 401a. Burnam incorporated that proposed map into an amendment, which was adopted by the House without objection and incorporated into the plan that was eventually enacted as Plan H358. J.A. 407a.

Proving that no good deed goes unpunished, the State then found itself confronted with not one, but *two* legal challenges—one by MALC and the Task Force claiming that the Legislature engaged in intentional vote dilution by failing to add *enough* Hispanic voters to now-majority-Hispanic HD90, and another facially contradictory challenge by the Task Force claiming that the Legislature engaged in racial gerrymandering by using race *at all* when drawing HD90. H.J.S. App. 70a-71a.

The district court correctly rejected the intentional-vote-dilution claim, concluding that HD90 sufficiently maintained Hispanic voting strength as a majority-Hispanic district. H.J.S. App. 84a. But the court then sustained the racial gerrymandering claim—even though the court itself had adopted the 2012 version of HD90 as a majority-Hispanic district—claiming that there was "no evidence" of "the amendment's effect on Latino voting ability in HD90." H.J.S. App. 82a. That holding is inexplicable. Not only had MALDEF told the Legislature that HD90 needed to be a majority-Hispanic district, but

MALC expressly opposed any drop below 50% Spanish-surname-voter-registration because that would "substantially dilute[] Hispanic voting power." J.A. 403a-404a. That assertion was supported by the extremely tight 2012 and 2014 primary elections in HD90, one of which the Hispanic candidate of choice narrowly lost.

The notion that a legislature may not consider race to address a specific, race-based concern about potential vote dilution defies common sense. This Court has admonished more times than bears repeating that States cannot be caught "between the competing hazards of liability" under the Constitution and the VRA. *E.g.*, *Bush*, 517 U.S. at 977. Allowing plaintiffs to charge a legislature with an unlawful purpose for attempting to address a race-based complaint is a surefire way to eliminate what little "breathing room" legislatures have left to enact districting legislation that withstands judicial scrutiny. *Cooper*, 137 S. Ct. at 1464.

CONCLUSION

The Court should reverse the district court's orders insofar as they invalidate districts in Plan C235 and Plan H358.

Respectfully submitted.

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FEBRUARY 2018

STATUTORY APPENDIX

TEXAS SESSION LAWS 2013

GENERAL AND SPECIAL

Eighty-Third Legislature, First Called Session

* * *

CHAPTER 2

S.B. No. 3

AN ACT

relating to the composition of districts for the election of members of the United States House of Representatives from Texas.

Be it enacted by the Legislature of the State of Texas:

ARTICLE I

SECTION 1. (a) The members of the Texas House of Representatives are elected from the districts described by Article II of this Act.

(b) One member is elected from each district established by this Act.

ARTICLE II

* * *

SECTION 32. District 32 is composed of Nueces County tracts 001400, 001802, 001902, 002101, 002102, 002303, 002304, 002601, 002602, 002603, 002703, 002704, 002705, 002706, 002900, 003001, 003002, 003101, 003102, 003202, 003203, 003204, 003303, 003304, 003305, 003306, 005102, 005404, 005413, 005414, 005415, 005416, 005417,

006200 and 990000; and that part of Nueces County tract 000500 included in blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061 and 1062; and that part of Nueces County tract 001000 included in block group 4; and that part of Nueces County tract 001100 included in block group 2 and block 1000; and that part of Nueces County tract 001200 included in block group 1 and blocks 2043, 2044, 2049, 2050, 2051, 2055, 2056, 2057, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 3029, 3030, 3031, 3032, 3033, 3034 and 3035; and that part of Nueces County tract 001300 included in block groups 2, 3 and 4; and that part of Nueces County tract 001702 included in blocks 1010, 1016, 2012, 2013, 2014, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024 and 2025; and that part of Nueces County tract 002001 included in block groups 1, 2 and 3 and blocks 4000, 4001, 4002, 4003, 4004 and 4007; and that part of Nueces County tract 002400 included in block group 4; and that part of Nueces County tract 002500 included in block group 1 and blocks 2000, 2001, 2002, 2003, 2004, 2008, 2010, 2012, 2014, 2015, 2016, 2018, 2019, 2021, 2022, 2023, 2024, 2025, 2029, 2030, 2031, 2032, 2033 and 4000; and that part of Nueces County tract 005406 included in block group 3 and blocks 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056,

1057, 1058, 1059, 1060, 1061, 1080, 1081, 1082, 1084, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2044, 2045, 2046, 2047, 2048, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168 and 2169; and that part of Nueces County tract 005410 included in block group 2 and blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010 and 1012; and that part of Nueces County tract 005411 included in block group 1 and blocks 2000, 2001. 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2015, 2016, 2017 and 2018; and that part of Nueces County tract 006000 included in blocks 2095, 2230, 2237, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2252 and 2253; and that part of Nueces County tract 006300 included in blocks 1313, 1314, 1321, 1322 and 1332; and that part of Nueces County tract 006400 included in blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1034, 1035, 1036, 2039, 2040, 2041, 2104,

2122, 2123, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2164, 2165, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3029, 3030, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041, 3042, 3043, 3044, 3045, 3046, 3047, 3048, 3049, 3050, 3051, 3052, 3053, 3054, 3055, 3056, 3057, 3058, 3059, 3060, 3061, 3062, 3063, 3064, 3065, 3066 and 3067.

* * *

SECTION 34. District 34 is composed of Nueces County tracts 000600, 000700, 000800, 000900, 001500, 001601, 001602, 001701, 001801, 001903, 001904, 002002, 002200, 002301, 003401, 003402, 003500, 003601, 003602, 003603, 003700, 005407, 005408, 005409, 005412, 005601, 005602, 005801, 005802, 005900, 006100 and 980000; and that part of Nueces County tract 000500 included in blocks 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084 and 1085; and that part of Nueces County tract 001000 included in block groups 1, 2 and 3; and that part of Nueces County tract 001100 included in blocks 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056 and 1057; and that part of Nueces County tract 001200 included in blocks 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017,

2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2045, 2046, 2047, 2048, 2052, 2053, 2054 and 3000; and that part of Nueces County tract 001300 included in block group 1; and that part of Nueces County tract 001702 included in blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1011, 1012, 1013, 1014, 1015, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011 and 2015; and that part of Nueces County tract 002001 included in blocks 4005, 4006, 4008, 4009, 4010, 4011, 4012, 4013, 4014 and 4015; and that part of Nueces County tract 002400 included in block groups 1, 2, 3 and 5; and that part of Nueces County tract 002500 included in block group 3 and blocks 2005, 2006, 2007, 2009, 2011, 2013, 2017, 2020, 2026, 2027, 2028, 2034, 2035, 2036, 2037, 2038, 4001, 4002, 4003, 4004, 4005, 4006 and 4007; and that part of Nueces County tract 005406 included in blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1083, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057 and

2067; and that part of Nueces County tract 005410 included in block 1011; and that part of Nueces County tract 005411 included in block 2014; and that part of Nueces County tract 006000 included in block group 1 and blocks 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2231, 2232, 2233, 2234, 2235, 2236, 2238, 2239, 2250, 2251, 2254, 2255, 2256, 2257, 2258, 2259 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280 and 2281;

and that part of Nueces County tract 006300 included in block group 2 and blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294,

1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1315, 1316, 1317, 1318, 1319, 1320, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344 and 1345; and that part of Nueces County tract 006400 included in blocks 1030, 1031, 1032, 1033, 1037, 1038, 1039, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2124, 2125, 2126, 2127, 2128, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 3026, 3027 and 3028.

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SECTION 54. District 54 is composed of Lampasas County; and Bell County tracts 021901, 021903, 021904, 022300, 022401, 022402, 022403, 022404, 022405, 022502, 023103, 023105, 023106, 023107, 023108, 023300, 980001 and 980002; and that part of Bell County tract 021800 included in block groups 2 and 3 and blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011,

1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194 and 1195; and that part of Bell County tract 022000 included in block groups 2, 3 and 4 and blocks 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1119, 1120, 1121, 1122, 1123, 1124, 1133, 1134 and 1138; and that part of Bell County tract 022200 included in block groups 2 and 3 and blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013 and 1014; and that part of Bell County tract 022501 included in block groups 2, 3 and 4; and that part of Bell County tract 022600 included in blocks 5022, 5024, 5027, 5028 and

5029; and that part of Bell County tract 023000 included in block groups 3 and 4; and that part of Bell County tract 023104 included in block group 1 and blocks 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2033, 2034, 2035, 2036 and 2037; and that part of Bell County tract 023202 included in blocks 2046, 2047, 2055, 2056, 2057, 2058, 2059, 2060, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140 and 2143; and that part of Bell County tract 023203 included in blocks 2017 and 2018; and that part of Bell County tract 023403 included in block groups 2, 3 and 4 and blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1131, 1132,

1133, 1134, 1135, 1136, 1137, 1138, 1139, 1142, 1144, 1145, 1146, 1147, 1153, 1154, 1155, 1156, 1157, 1159, 1160, 1161, 1162 and 1163; and that part of Bell County tract 023404 included in block group 2 and blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1018, 1019, 1020, 1021, 1022, 1023, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1115 and 1135.

SECTION 55. District 55 is composed of Bell County tracts 020100, 020201, 020202, 020300, 020401, 020402, 020500, 020600, 020701, 020702, 020800, 020900, 021000, 021100, 021201, 021202, 021203, 021301, 021302, 021303, 021400, 021500, 021601, 021602, 021700, 022101, 022103, 022104, 022105, 022801, 022900, 023201, 023204, 023402, 023500 and 980003; and that part of Bell County tract 021800 included in block 1183; and that part of Bell County tract 022000 included in blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1086, 1094, 1095, 1096, 1097, 1116, 1117, 1118, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1135, 1136 and 1137; and that part of Bell County tract 022200 included in block 1015; and that part of Bell County tract 022501 included in block group 1; and that part of Bell County tract 022600 included in block groups 1, 2, 3 and 4 and

blocks 5000, 5001, 5002, 5003, 5004, 5005, 5006, 5007, 5008, 5009, 5010, 5011, 5012, 5013, 5014, 5015, 5016, 5017, 5018, 5019, 5020, 5021, 5023, 5025 and 5026; and that part of Bell County tract 023000 included in block groups 1 and 2; and that part of Bell County tract 023104 included in blocks 2000, 2011, 2012 and 2032; and that part of Bell County tract 023202 included in block group 1 and blocks 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2092, 2093, 2094, 2113, 2114, 2141 and 2142; and that part of Bell County tract 023203 included in block group 1 and blocks 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016 and 2019; and that part of Bell County tract 023403 included in blocks 1031, 1129, 1130, 1140, 1141, 1143, 1148, 1149, 1150, 1151, 1152 and 1158; and that part of Bell County tract 023404 included in blocks 1017, 1024, 1025, 1026, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143 and 1144.

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SECTION 90. District 90 is composed of Tarrant County tracts 100201, 100300, 100800, 101202, 102500, 103701, 104503, 104601, 104602, 104701, 104803, 104804, 105001 and 105800; and that part of Tarrant County tract 100201 included in block groups 3 and 4 and blocks 2008, 5006, 5007, 5008, 5009, 5010, 5011, 5012, 5013 and 5014; and that part of Tarrant County tract 100102 included in block groups 3 and 4 and blocks 2015, 2016, 2017, 2018, 2019, 2020, 2022, 2023, 2024, 2025 and 2026; and that part of Tarrant County tract 100202 included in block groups 1 and 3 and blocks 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063 and 2064; and that part of Tarrant County tract 100400 included in block groups 1, 2, 4, 5 and 6 and blocks 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3015, 3016, 3017, 3018, 3019, 3020, 3021 and 3022; and that part of Tarrant County tract 100501 included in block groups 1, 2, 3 and 4 and blocks 5000, 5001, 5002, 5003, 5004, 5005, 5006, 5007, 5008, 5009, 5010, 5011, 5012, 5013, 5014, 5015, 5016, 5017, 5018, 5019, 5020, 5021, 5023, 5043, 5044, 5051, 5052, 5053, 5054, 5055, 5056, 5057, 5058, 5059, 5060 and 5061; and that part of Tarrant County tract 100502 included in block groups 2, 3, 4 and 6 and blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1015, 1016, 1017, 1018, 1021, 1022, 1023, 1024, 1025 and 1026;

and that part of Tarrant County tract 100700 included in blocks 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1017, 1018, 1019, 1020, 1025, 1026, 1028 and 3000; and that part of Tarrant County tract 100900 included in block group 1 and blocks 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2071, 2072 and 2073; and that part of Tarrant County tract 101201 included in block group 2 and blocks 1102, 1103, 1104, 1105, 1106, 1109, 1110, 1111, 1112 and 1114; and that part of Tarrant County tract 101402 included in block group 3 and blocks 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009 and 2010; and that part of Tarrant County tract 101500 included in block groups 2, 3, 4 and 5 and blocks 1000 and 1001; and that part of Tarrant County tract 101700 included in blocks 2003, 2005 and 2006; and that part of Tarrant County tract 102000 included in blocks 1000, 1001, 1002, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1034, 1035, 1052, 1053, 1059, 1060, 1065, 1066, 1067, 1068, 1069, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061,

2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081 and 2082; and that part of Tarrant County tract 102401 included in blocks 4000, 4001, 4010, 4011, 4012 and 4013; and that part of Tarrant County tract 102601 included in block 1035; and that part of Tarrant County tract 102602 included in blocks 1035, 1036, 1037, 1038, 1039, 1046, 1047, 1048, 1049, 1053, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2057, 2063, 2064, 2065, 2066, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081 and 2082; and that part of Tarrant County tract 102800 included in blocks 1000 and 1001; and that part of Tarrant County tract 103500 included in block groups 2, 3 and 4 and blocks 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012 and 1013; and that part of Tarrant County tract 103702 included in block group 1 and blocks 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2013, 2014, 2015, 2016 and 2017; and that part of Tarrant County tract 104100 included in block group 2 and blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1015, 1016, 1017, 1018, 1021, 1022, 1023, 1028, 1029, 3000, 3001, 3008, 3009, 4000 and 4007; and that part of Tarrant County tract 104202 included in blocks 2011, 2012, 4018 and 4019; and that part of Tarrant County tract 104300 included in blocks 1019, 1020, 3000, 3001, 3002, 3003, 3008, 3009,

3010, 3011, 3012, 3013, 3014, 3015, 3016, 3018, 3019, 3020, 3021, 5009, 5010, 5012 and 5013; and that part of Tarrant County tract 104400 included in block group 4 and blocks 1000, 1001, 1002, 1009, 1010, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 2004, 2005, 2006, 2007, 2008, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 3000, 3001, 3002, 3003, 3006, 3007, 3008, 3009 and 3010; and that part of Tarrant County tract 104502 included in block group 2 and blocks 1008, 1009, 1010, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074 and 1075; and that part of Tarrant County tract 104504 included in block group 1 and blocks 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032 and 2033; and that part of Tarrant County tract 104505 included in blocks 2006, 2007, 3022, 3023, 3024, 3025 and 3026; and that part of Tarrant County tract 104603 included in block group 3 and blocks 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1019, 1020, 2000, 2001, 2002, 2003, 2004, 2007, 2008, 2009, 2010, 2011, 2012, 2015, 2016, 2018, 2019 and 2020; and that part of Tarrant County tract 104604 included in block group 1 and blocks 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2021, 2022, 2023, 2024, 2025,

2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070 and 2071; and that part of Tarrant County tract 104702 included in block groups 2 and 3 and blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1055, 1056, 1057, 1058 and 1059; and that part of Tarrant County tract 104802 included in block groups 1, 3 and 4 and blocks 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012 and 2013; and that part of Tarrant County tract 104900 included in blocks 1004, 1005, 1006, 2011, 2012, 2013, 2014, 2020, 2021, 2022, 2023, 2024, 2025 and 2026; and that part of Tarrant County tract 105006 included in blocks 1078, 1079, 1081, 1082, 1083, 1100, 1102, 1103, 1104, 1105, 1106, 1107, 1111, 1112, 1113, 1120, 1121, 1122, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1187, 1188, 1189, 1190, 1191, 1192, 1193 and 1195; and that part of Tarrant County tract 105403 included in blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016,

1017, 1018, 1019, 1020, 1022, 1023, 1024, 1025, 1026 and 1027; and that part of Tarrant County tract 105405 included in blocks 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014 and 3015; and that part of Tarrant County tract 105600 included in blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1015, 1016, 1017, 1018, 1023, 1024, 1030, 1031, 1032, 2000, 2001, 2002, 2003, 2004, 2005, 2007, 2009, 2010 and 4010; and that part of Tarrant County tract 105901 included in block groups 1 and 2 and blocks 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3028, 3029, 3030, 3031, 3032, 3039, 3040, 3041, 3042, 3047, 3048 and 3050; and that part of Tarrant County tract 105902 included in blocks 2001 and 2003; and that part of Tarrant County tract 110402 included in blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1049, 2013, 2014, 2020, 2021 and 2022; and that part of Tarrant County tract 110500 included in block 5028; and that part of Tarrant County tract 123200 included in blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073,

1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1145, 1150, 1151, 1152, 1154, 1156, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1169, 1170, 1171, 1172, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1201, 1206, 1208, 1209, 1210, 1211 and 1220; and that part of Tarrant County tract 123300 included in blocks 1051, 1056, 1057, 1058, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1159 and 2000; and that part of Tarrant County tract 123400 included in blocks 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 2027, 2028, 2029, 2031, 2033, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2058, 2059, 2060, 2061, 2067, 2068, 2075, 2076, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011 and 3018; and that part of Tarrant County tract 123600 included in blocks 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2030, 2031,

2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068 and 2069.

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SECTION 103. District 103 is composed of Dallas County tracts 000404, 000405, 000406, 004202, 004400, 004600, 004700, 006800, 006900, 007102, 007201, 007202, 009610, 009802, 009803, 009804, 009900, 010601, 010602, 010701, 013901, 014137, 014138, 014603, 014703, 014901, 014902 and 980100; and that part of Dallas County tract 000401 included in block groups 1 and 2 and blocks 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026 and 3028; and that part of Dallas County tract 000500 included in block groups 1, 3 and 4 and blocks 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2012, 2013, 2014, 2015, 2033, 2034, 2035 and 2042; and that part of Dallas County tract 000601 included in block groups 2, 3, 4 and 5 and blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017 and 1018; and that part of Dallas County tract 000603 included in block groups 1 and 3 and blocks 2003, 2006, 2007, 2008, 2009, 2012, 2013, 2014 and 4012; and that part of Dallas County tract 000605 included in blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1011, 1012, 1013, 1014, 1015, 1016, 1017 and 1018; and that part of Dallas County tract 000606 included in blocks 1030, 1031, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012

and 2014; and that part of Dallas County tract 004201 included in block group 1; and that part of Dallas County tract 004300 included in block group 3 and blocks 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1031, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 2000, 2001, 2002, 2003, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2023 and 2024; and that part of Dallas County tract 004500 included in block group 1 and blocks 2000, 2001, 2002, 2003, 2004, 2017, 2018, 2019, 2020, 2021, 2026, 2027, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 3029, 3030, 3031, 3032, 3033, 3034, 3035, 3036, 3039, 3040, 3041, 3042, 3043, 3044, 3045, 3046, 3047, 3048, 3049, 3050, 3051, 3052, 3053, 3054, 3055, 3056, 3057, 3058, 3059, 3060, 3061 and 3062; and that part of Dallas County tract 005100 included in blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1014, 1015, 1016 and 1017; and that part of Dallas County tract 005200 included in block group 1 and blocks 2000, 2001, 2002, 2003 and 2004; and that part of Dallas County tract 006700 included in blocks 2000, 2001, 2002, 2003 and 2004; and that part of Dallas County tract 007302 included in blocks 4008 and 4009; and that part of Dallas County tract 009401 included in block group 1 and blocks

2018, 2019, 2020 and 2022; and that part of Dallas County tract 009402 included in block 1024; and that part of Dallas County tract 009605 included in blocks 1011, 1012, 1013, 1014, 1015, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035 and 1036; and that part of Dallas County tract 009607 included in blocks 2001, 2002, 2003 and 3002; and that part of Dallas County tract 009611 included in blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1011, 1012, 1013, 1014, 1015, 1016, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2015, 2016, 2017, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013 and 3015; and that part of Dallas County tract 009701 included in block group 2 and blocks 1005, 1006, 1007, 1008, 1009, 1010, 1013, 1014, 1015, 1017, 1018, 1019, 1020, 1033, 1034, 1035, 1036, 3006, 3007, 3008, 3009, 3011, 3012, 3013, 3014, 3020 and 3027; and that part of Dallas County tract 009702 included in blocks 1010, 1017, 1018, 1019 and 1020; and that part of Dallas County tract 010000 included in blocks 1015, 1022, 1023, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103,

2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2285, 2286, 2287, 2288, 2289, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371 and 2372; and that part of Dallas County tract 010500 included in blocks 1000, 1001, 1002, 1003, 1004, 1005, 1013, 1014, 1015, 1016, 1017, 1019, 1020, 1021, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048,

2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056 and 2057; and that part of Dallas County tract 013713 included in blocks 1008, 1009, 1010 and 1011; and that part of Dallas County tract 013714 included in blocks 3006, 3007 and 3008; and that part of Dallas County tract 014001 included in blocks 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1060, 1061, 1062, 1073, 1074, 1077, 1078, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3023, 3024, 3025, 3026, 3027, 3028, 3029, 3030, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039 and 3040; and that part of Dallas County tract 014002 included in blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099 and 1101; and that part of Dallas County tract 014124 included in blocks 1000, 1001, 1002, 1003, 1004, 1005, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1078, 1079, 1080, 1081 and 1083; and that part of Dallas County tract 014130 included in blocks 1032 and 1036; and that part of Dallas County

tract 014405 included in blocks 2006, 2007, 2011, 2012, 2013, 2014, 2015, 2022, 2023 and 3000; and that part of Dallas County tract 014406 included in block group 1; and that part of Dallas County tract 014502 included in block 3020; and that part of Dallas County tract 014601 included in blocks 2000, 2004, 2005, 2010 and 2011; and that part of Dallas County tract 014602 included in block groups 2 and 3 and blocks 1006, 1007, 1010, 1011 and 1012; and that part of Dallas County tract 014701 included in block group 1; and that part of Dallas County tract 014702 included in block group 3 and block 1017; and that part of Dallas County tract 015000 included in block group 2 and blocks 1008, 1009, 1010, 1011, 1012, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 4000 and 4015; and that part of Dallas County tract 015202 included in blocks 1004, 1006, 1007, 1008, 1012, 1013, 1014, 1015, 2002, 2003, 2004, 2005, 2006, 2014, 2015 and 2019; and that part of Dallas County tract 015205 included in block group 1; and that part of Dallas County tract 019800 included in block 3026; and that part of Dallas County tract 020100 included in blocks 1117, 1118, 1119, 1120, 1124, 1125, 1126, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2028, 2030, 2031, 2032, 2033, 2034, 2036, 2037, 2038, 2039, 2040, 2041 and 2042; and that part of Dallas County tract 020500 included in blocks 1003, 1004, 1005, 1006, 1007, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 2012, 2015, 2016 and 2017.

SECTION 104. District 104 is composed of Dallas County tracts 002000, 004800, 005000, 005300, 006301,

006302, 006401, 006402, 006501, 006502, 010704, 010804, 015403, 015404, 015600, 015700, 015800, 016302, 016406 and 019900; and that part of Dallas County tract 004201 included in block groups 2, 3, 4 and 5; and that part of Dallas County tract 004300 included in blocks 1000, 1001, 1002, 1029, 1030, 1032, 1033, 1034, 1035, 1070 and 1071; and that part of Dallas County tract 004500 included in block group 4 and blocks 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2022, 2023, 2024, 2025, 3037 and 3038; and that part of Dallas County tract 005100 included in block group 2 and blocks 1011, 1012, 1013, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046 and 1047; and that part of Dallas County tract 005200 included in block groups 3 and 4 and blocks 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015 and 2016; and that part of Dallas County tract 005600 included in block group 1 and blocks 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 4000, 4001, 4002, 4003, 4004, 4005, 4006, 4007, 4008, 4009, 4010, 4011, 4012, 4013, 4014, 4015 and 4016; and that part of Dallas County tract 006001 included in block group 3 and blocks 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1017, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013 and 2015; and that part of Dallas County tract 006200 included in block groups 2, 4 and 5 and blocks 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024,

3025, 3026, 3027, 3028, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041, 3042, 3043, 3044, 3045, 3046 and 3047; and that part of Dallas County tract 006700 included in block groups 1, 3 and 4 and blocks 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044 and 2045; and that part of Dallas County tract 010101 included in blocks 3000, 3001, 3002, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3025, 3026, 3027 and 3028; and that part of Dallas County tract 010102 included in block groups 1 and 3 and blocks 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2016 and 2017; and that part of Dallas County tract 010703 included in block group 1 and blocks 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2033, 2034 and 2035; and that part of Dallas County tract 010801 included in block groups 1 and 2 and blocks 3000, 3001, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 4000, 4001, 4009, 4010, 4011, 4012, 4013, 4014, 4015, 4023 and 4024; and that part of Dallas County tract 010805 included in block groups 2 and 3 and blocks 1011, 1012, 1013, 1014, 1015, 1016, 1017 and 1018; and that part of Dallas County tract 015204 included in blocks 6002, 6003, 6004, 6005, 6009, 6010, 6011, 6012, 6013, 6014, 6015, 6016, 6017 and 6023; and that part of Dallas County tract 015304 included in blocks 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1049, 1050,

1051 and 1053; and that part of Dallas County tract 015500 included in blocks 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1034, 1035, 1036, 1037, 1038 and 1039; and that part of Dallas County tract 015900 included in block group 1 and blocks 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 3029, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3041, 3042 and 3043; and that part of Dallas County tract 016001 included in block groups 1, 3 and 4 and blocks 2001, 2002, 2003, 2004, 2005, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2020 and 2021; and that part of Dallas County tract 016002 included in blocks 1000, 1008, 1014 and 1018; and that part of Dallas County tract 016100 included in block group 2 and blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1052, 1053 and 1057; and that part of Dallas County tract 016202 included in block group 4 and blocks 2006, 2007, 2010 and 2011; and that part of Dallas County tract 016301 included in block groups 1 and 3 and blocks 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2018, 2019, 2020, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2043, 2044, 2045 and 2046; and that part of Dallas County tract 016401 included in block groups 1 and 4 and blocks 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3012, 3013, 3014, 3015, 3016, 3017 and 3018; and that part of Dallas County tract 016407 included in block groups 1

and 3 and blocks 2007, 2009, 2010, 2012, 2013, 4003, 4004, 4005 and 4006; and that part of Dallas County tract 016408 included in blocks 1000, 1001, 1002, 1003, 1004 and 1005; and that part of Dallas County tract 016409 included in blocks 1000, 1001, 1002 and 1031; and that part of Dallas County tract 016410 included in blocks 1000 and 1001; and that part of Dallas County tract 016412 included in blocks 1000, 1001, 1002, 1003, 1005, 1025, 1026, 1027, 1030, 1036, 2000, 2001, 2012, 2022, 2023, 2024, 2050 and 2051; and that part of Dallas County tract 016413 included in block group 3 and blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1012, 1013, 1014, 1016, 1017, 1018, 1019, 1020, 1021, 2000, 2001, 2002, 2003, 2009, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2038, 2039, 2040, 2041, 2042, 2048, 2049 and 2050; and that part of Dallas County tract 016510 included in blocks 2034, 2038, 2039, 2040 and 2041; and that part of Dallas County tract 016521 included in blocks 1021 and 2012.

SECTION 105. District 105 is composed of Dallas County tracts 014115, 014116, 014203, 014204, 014205, 014206, 014302, 014306, 014307, 014308, 014309, 014310, 014312, 014403, 014407, 014408, 014501, 015100, 015206, 015303, 015305, 015306, 015401 and 016201; and that part of Dallas County tract 014103 included in blocks 1133, 1134, 2003 and 2004; and that part of Dallas County tract 014311 included in block 3007; and that part of Dallas County tract 014405 included in block group 1 and blocks 2000, 2001, 2002, 2003, 2004, 2005, 2008, 2009, 2010, 2016, 2017, 2018, 2019, 2020, 2021, 3001, 3002, 3003, 3004, 3005,

3006, 3007 and 3008; and that part of Dallas County tract 014406 included in block groups 2 and 3; and that part of Dallas County tract 014502 included in block groups 1 and 2 and blocks 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018 and 3019; and that part of Dallas County tract 014601 included in block group 1 and blocks 2001, 2002, 2003, 2006, 2007, 2008 and 2009; and that part of Dallas County tract 014602 included in blocks 1000, 1001, 1002, 1003, 1004, 1005, 1008 and 1009; and that part of Dallas County tract 014701 included in block groups 2, 3 and 4; and that part of Dallas County tract 014702 included in block group 2 and blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016 and 1018; and that part of Dallas County tract 015000 included in block group 5 and blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1013, 1014, 1015, 1016, 3014, 4001, 4002, 4003, 4004, 4005, 4006, 4007, 4008, 4009, 4010, 4011, 4012, 4013, 4014, 4016, 4017, 4018, 4019, 4020, 4021 and 4022; and that part of Dallas County tract 015202 included in blocks 1000, 1001, 1002, 1003, 1005, 1009, 1010, 1011, 2000, 2001, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2016, 2017 and 2018; and that part of Dallas County tract 015204 included in block groups 1, 2, 3, 4 and 5 and blocks 6000, 6001, 6006, 6007, 6008, 6018, 6019, 6020, 6021 and 6022; and that part of Dallas County tract 015205 included in block groups 2 and 3: and that part of Dallas County tract 015304 included in block group 2 and blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027,

1028, 1029, 1046, 1047, 1048 and 1052; and that part of Dallas County tract 015500 included in block groups 2 and 3 and blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032 and 1033; and that part of Dallas County tract 015900 included in block group 2 and blocks 3030, 3031 and 3040; and that part of Dallas County tract 016001 included in blocks 2000, 2006, 2007, 2008, 2009, 2010 and 2019; and that part of Dallas County tract 016002 included in block group 2 and blocks 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1009, 1010, 1011, 1012, 1013, 1015, 1016, 1017, 1019, 1020, 1021, 1022, 1023, 1024 and 1025; and that part of Dallas County tract 016100 included in blocks 1028, 1029, 1030, 1031, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1054, 1055 and 1056; and that part of Dallas County tract 016202 included in block groups 1 and 3 and blocks 2000, 2001, 2002, 2003, 2004, 2005, 2008 and 2009; and that part of Dallas County tract 016301 included in blocks 2017, 2021, 2022, 2023, 2024, 2025, 2041 and 2042; and that part of Dallas County tract 016401 included in block group 2 and blocks 3007, 3008, 3009, 3010 and 3011; and that part of Dallas County tract 016407 included in blocks 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2008, 2011, 2014, 2015, 2016, 2017, 4000, 4001, 4002, 4007, 4008, 4009, 4010, 4011 and 4012; and that part of Dallas County tract 016408 included in block groups 2, 3 and 4 and blocks 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041 and 1042; and that part of Dallas

County tract 016409 included in block group 2 and blocks 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030. 1032, 1033 and 1034; and that part of Dallas County tract 016412 included in blocks 1004, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1028, 1029, 1031, 1032, 1033, 1034, 1035, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049 and 2052; and that part of Dallas County tract 016413 included in block 2037; and that part of Dallas County tract 020100 included in blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1121, 1122, 1123, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 2000, 2001, 2002, 2003, 2004, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2027, 2029

and 2035; and that part of Dallas County tract 980000 included in blocks 1131, 1150, 1151 and 1152.

* * *

ARTICLE III

SECTION 1. In this Act, "tract," "block group," and "block" mean the geographic areas identified by those terms on the 2010 Census TIGER/Line Shapefiles, prepared by the federal Bureau of the Census for the Twenty-third Decennial Census of the United States, enumerated as of April 1, 2010.

SECTION 2. It is the intention of the Texas Legislature that, if any county, tract, block group, block, or other geographic area has erroneously been left out of this Act, a court reviewing this Act should include that area in the appropriate district in accordance with the intent of the legislature, using any available evidence of that intent, including evidence such as that used by the Supreme Court of Texas in Smith v. Patterson, 111 Tex. 535, 242 S.W. 749 (1922).

SECTION 3. Chapter 1271 (H.B. 150), Acts of the 82nd Legislature, Regular Session, 2011 (Article 195a-12, Vernon's Texas Civil Statutes), is repealed.

SECTION 4. The districts set out in this Act apply to the election of the members of the Texas House of Representatives beginning with the primary and general elections in 2014 for members of the 84th Legislature. This Act does not affect the membership or districts of the House of Representatives of the 83rd Texas Legislature.

SECTION 5. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect on the 91st day after the last day of the legislative session.

Passed the Senate on June 14, 2013: Yeas 16, Nays 11; the Senate concurred in House amendments on June 23, 2013: Yeas 18, Nays 11; passed the House, with amendments, on June 21, 2013: Yeas 93, Nays 46, three present not voting.

Approved June 26, 2013.

Effective September 24, 2013.

CHAPTER 3

S.B. No. 4

AN ACT

relating to the composition of districts for the election of members of the United States House of Representatives from Texas.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. The interim redistricting plan used to elect members of the United States House of Representatives from the State of Texas in 2012 ordered by the United States District Court for the Western District of Texas on February 28, 2012, in the case of Perez, et al. v. Perry, et al. (No. SA-11-CV-360), and identified as

PLANC235 on the redistricting computer system operated by the Texas Legislative Council, is hereby ratified and adopted as the permanent plan for districts used to elect members of the United States House of Representatives from the State of Texas.

SECTION 2. In making this enactment the legislature finds that:

(1) the United States District Court for the Western District of Texas properly applied the decision of the United States Supreme Court on January 20, 2012, in Perry, et al. v. Perez, et al., 565 U.S. ___ (2012) (per curiam), in the creation of the district court's interim plan for Texas' congressional districts for use in the 2012 elections;

(2) the district court's interim plan for Texas' congressional districts complies with all federal and state constitutional provisions or laws applicable to redistricting plans, including the federal Voting Rights Act; and

(3) the adoption of the district court's interim plan for Texas' congressional districts as a permanent plan by the Texas Legislature will:

(A) diminish the expense of further time and money by all parties in Texas' ongoing redistricting litigation;

(B) avoid disruption of the upcoming election cycle; and

(C) provide certainty and continuity to the citizens of Texas regarding the districts used to elect members of the United States House of Representatives from Texas.

SECTION 3. Chapter 1 (Senate Bill No. 4), Acts of the 82nd Legislature, 1st Called Session, 2011 (Article 197j, Vernon's Texas Civil Statutes), is repealed.

SECTION 4. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect on the 91st day after the last day of the legislative session.

Passed the Senate on June 14, 2013: Yeas 16, Nays 11; passed the House on June 21, 2013: Yeas 93, Nays 47, two present not voting.

Approved June 26, 2013.

Effective September 24, 2013.

Nos. 17-586 and 17-626

In the Supreme Court of the United States

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL., APPELLANTS

v.

SHANNON PEREZ, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS APPELLEE IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether this Court may exercise jurisdiction over these appeals.

2. Whether the district court erred in concluding that the Texas Legislature acted with a racially discriminatory purpose in adopting districts in its 2013 congressional and State House plans that the district court had included in its own 2012 interim redistricting plans and had provisionally determined were not unlawful.

3. Whether the district court erred in concluding that Congressional District 35 in the 2013 congressional plan violated the Equal Protection Clause of the Fourteenth Amendment.

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In the Supreme Court of the United States

Nos. 17-586 & 17-626

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL., APPELLANTS

v.

SHANNON PEREZ, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS APPELLEE IN SUPPORT OF APPELLANTS

OPINIONS BELOW

In No. 17-586, the district court's order on Texas's 2013 congressional redistricting plan (Plan C235) (C.J.S. App. 3a-119a)[1] is reported at 274 F. Supp. 3d 624. That order incorporates the court's prior opinion on the 2011 congressional redistricting plan (Plan C185) (C.J.S. App. 120a-366a; see C.J.S. App. 14a n.13), which is reported at 253 F. Supp. 3d 864.

In No. 17-626, the district court's order on Texas's 2013 State House redistricting plan (Plan H358) (H.J.S. App. 3a-87a) is reported at 267 F. Supp. 3d 751. That order incorporates the court's prior opinion on the 2011 State House redistricting plan (Plan H283) (H.J.S. App. 88a-299a; see H.J.S. App. 7a n.5), which is reported at 250 F. Supp. 3d 123.

[1] Citations to "C.J.S." refer to filings in No. 17-586, while citations to "H.J.S." refer to filings in No. 17-626.

JURISDICTION

In No. 17-586, the order of the district court was entered on August 15, 2017. Appellants filed their notice of appeal on August 18, 2017 (C.J.S. App. 1a-2a). In No. 17-626, the order of the district court was entered on August 24, 2017. Appellants filed their notice of appeal on August 28, 2017 (H.J.S. App. 1a-2a). Appellants invoke this Court's jurisdiction under 28 U.S.C. 1253. This Court has postponed further consideration of the question of jurisdiction pending a hearing on the merits.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendices to the jurisdictional statements. See C.J.S. App. 426a-428a; H.J.S. App. 437a-439a.

STATEMENT

These appeals concern redistricting plans enacted by the Texas Legislature in 2013 for the State's House of Representatives (the State House plan) and for the State's Representatives in the United States House of Representatives (the congressional plan). The 2013 plans were based, entirely or almost entirely, on interim remedial plans that a three-judge court of the District Court for the Western District of Texas adopted in 2012, after that court had enjoined use of the Legislature's prior 2011 redistricting plans pending separate preclearance proceedings in the District Court for the District of Columbia. In the decisions under review, the district court invalidated several districts in the 2013 congressional and State House plans on the grounds that they were intentionally discriminatory, were racially gerrymandered, or caused unlawful vote dilution

in violation of the Equal Protection Clause of the Fourteenth Amendment or the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 *et seq.* (Supp. III 2015).[2]

The United States intervened in the Texas district court to assert claims that the 2011 plans were enacted with racially discriminatory intent in violation of Section 2 of the VRA, 52 U.S.C. 10301. The United States has not brought any claims challenging the 2013 congressional or State House plans. The United States nonetheless retains a significant interest in these appeals because the United States, through the Attorney General, has primary responsibility for enforcing the VRA. See 52 U.S.C. 10308(d). Accordingly, the United States has a substantial interest in the proper interpretation of the VRA and the related constitutional protection against the unjustified use of race in redistricting.

1. "[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe* v. *Emison*, 507 U.S. 25, 34 (1993). States have substantial discretion to make the judgments and compromises necessary to balance the complex array of "competing interests" involved in redistricting. *Miller* v. *Johnson*, 515 U.S. 900, 915 (1995). At the same time, both the Constitution and federal statutes impose constraints on redistricting in order to prevent racial discrimination.

a. Section 2 of the VRA imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby County* v. *Holder*, 133 S. Ct. 2612, 2631 (2013). Section 2 prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of

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[2] All references to Sections of the VRA are found in the 2015 Supplement of the United States Code.

the United States to vote on account of race or color." 52 U.S.C. 10301(a). As amended in 1982, Section 2 provides that a violation may be "established if, based on the totality of circumstances, it is shown that the [election] processes * * * in the State or political subdivision are not equally open to participation by members of a [protected] class [who] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b).

Both Section 2 of the VRA and the Equal Protection Clause of the Fourteenth Amendment prohibit intentional "vote dilution." *Rogers* v. *Lodge*, 458 U.S. 613, 617, 621 (1982) (Fourteenth Amendment); *Garza* v. *County of Los Angeles*, 918 F.2d 763, 766 (9th Cir. 1990) (Section 2), cert. denied, 498 U.S. 1028 (1991); S. Rep. No. 417, 97th Cong., 2d Sess. 27 & n.108 (1982) (Senate Report) (same). Vote dilution is caused "either 'by the dispersal of [minority voters] into districts in which they constitute an ineffective minority of voters or from the concentration of [minority voters] into districts where they constitute an excessive majority.'" *Voinovich* v. *Quilter*, 507 U.S. 146, 154 (1993) (quoting *Thornburgh* v. *Gingles*, 478 U.S. 30, 46 n.11 (1986)).

In addition, vote dilution without a finding of discriminatory intent may violate Section 2 under its "results" test. This Court has identified three "preconditions" for a vote-dilution claim under that test: (1) The minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group must be "politically cohesive," and (3) the majority must "vote[] sufficiently as a bloc" to usually "defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51; see

Cooper v. *Harris*, 137 S. Ct. 1455, 1470 (2017). For single-member districting schemes, the first precondition also requires showing a "possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson* v. *De Grandy*, 512 U.S. 997, 1008 (1994). If a party establishes those preconditions, a court then must "consider the 'totality of circumstances' to determine whether members of a racial group have less opportunity than do other members of the electorate." *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 425-426 (2006) (*LULAC*) (quoting *De Grandy*, 512 U.S. at 1011-1012); see Senate Report 27-29 (articulating factors to consider). The Court has reserved the question of how "intentional discrimination affects the *Gingles* analysis" for a Section 2 claim. *Bartlett* v. *Strickland*, 556 U.S. 1, 20 (2009) (plurality opinion).

b. The Equal Protection Clause, in addition to prohibiting intentional vote dilution, forbids the unjustified, predominant use of race in drawing districts, known as "unconstitutional racial gerrymandering." *Shaw* v. *Reno*, 509 U.S. 630, 641 (1993) (*Shaw I*). Such a claim is "'analytically distinct' from a vote dilution claim." *Miller*, 515 U.S. at 911 (citation omitted). In adjudicating a racial-gerrymandering claim, the court must determine whether race was "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district"—*i.e.*, whether race is the "dominant and controlling rationale" for a district's lines. *Id.* at 913, 916. If so, that use of race comports with the Equal Protection Clause only if it is narrowly tailored to serve a compelling state interest. *Id.* at 920; see *Hunt* v. *Cromartie*,

526 U.S. 541, 547 (1999) ("[S]trict scrutiny applies if race was 'the predominant factor' motivating the legislature's districting decision.").

This Court has "long assumed" that States have a compelling interest in complying with Section 2 of the VRA. *Cooper*, 137 S. Ct. at 1469; see, *e.g.*, *Abrams* v. *Johnson*, 521 U.S. 74, 91 (1997); *Shaw* v. *Hunt*, 517 U.S. 899, 915 (1996) (*Shaw II*); *Bush* v. *Vera*, 517 U.S. 952, 978 (1996) (plurality opinion); *Bush*, 517 U.S. at 990 (O'Connor, J., concurring).[3] The predominant use of race in an effort to comply with the VRA will survive strict scrutiny so long as a State has "a 'strong basis in evidence' in support of the (race-based) choice that it has made." *Alabama Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1274 (2015) (citation omitted). A "strong basis in evidence" exists so long as legislators "have *good reasons* to believe such use [of race] is required, even if a court does not find that the actions were necessary for statutory compliance." *Ibid.* (citation omitted). That standard affords States "'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Cooper*, 137 S. Ct. at 1464 (quoting *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788, 802 (2017)).

2. This litigation arises from redistricting undertaken by Texas following the 2010 Census. The Census showed that Texas had gained more than four million

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[3] This Court also has repeatedly assumed that States have a compelling interest in complying with Section 5 of the VRA. See, *e.g.*, *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788, 801 (2017) (rejecting racial-gerrymandering claim where the "State had sufficient grounds to determine that the race-based calculus it employed * * * was necessary to avoid violating § 5").

new residents, which entitled it to four additional Representatives in the U.S. House of Representatives. See *Perry* v. *Perez*, 565 U.S. 388, 390 (2012) (per curiam).

a. In June 2011, the Texas Legislature enacted redistricting plans for, as relevant here, the State House (Plan H283) and the U.S. congressional delegation (Plan C185).[4] At that time, Section 5 of the VRA required the State to obtain preclearance before implementing those plans, a process that required it to show that the plans "neither ha[d] the purpose nor w[ould] have the effect" of discriminating on the basis of race. 52 U.S.C. 10304(a). Texas sought preclearance for its 2011 plans by filing a declaratory-judgment action in the District Court for the District of Columbia in July 2011.

Meanwhile, in June and July 2011, various plaintiffs brought Section 2 and constitutional claims against the 2011 congressional and State House plans, which were consolidated before a three-judge district court in the Western District of Texas. That court enjoined use of the 2011 plans and—lacking any final decision on preclearance from the D.C. district court—adopted interim redistricting plans to govern the 2012 elections. In doing so, the district court believed that it "was not required to give any deference to the Legislature's enacted plan[s]." *Perry*, 565 U.S. at 396 (citation and internal quotation marks omitted).

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[4] The Legislature also enacted a redistricting plan for the State Senate, which led to separate litigation before the same three-judge court. See *Davis* v. *Perry*, No. 11-788 (W.D. Tex. Sept. 22, 2011). Following adoption of a revised plan in 2013, the State Senate litigation was dismissed as moot. See *Davis* v. *Abbott*, 781 F.3d 207, 209 (5th Cir.), cert. denied, 136 S. Ct. 534 (2015). The State Senate plan is not at issue in these appeals.

This Court vacated the interim plans and remanded for further proceedings. *Perry*, 565 U.S. at 399. The Court agreed that, absent preclearance of the State's 2011 plans, it was necessary for the district court to devise interim plans for the 2012 elections. *Id.* at 392. The Court concluded, however, that the district court had erred "[t]o the extent [it] * * * substituted its own concept of the 'collective public good'" in formulating interim relief. *Id.* at 396. The Court concluded that "[the] district court should take guidance from the State's recently enacted plan," to the extent the legislative policies reflected in that plan "'do not lead to violations of the Constitution or the Voting Rights Act.'" *Id.* at 393 (citation omitted).

This Court then articulated legal standards for devising interim plans on remand. When portions of a State's enacted plan are alleged to violate the Constitution or Section 2 of the VRA, "a district court should still be guided by that plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits." *Perry*, 565 U.S. at 394. When portions of the State's enacted plan are the subject of a Section 5 preclearance proceeding elsewhere that has not yet been completed, the district court must "tak[e] guidance from a State's policy judgments unless they reflect aspects of the state plan that stand a reasonable probability of failing to gain § 5 preclearance." *Id.* at 395. The Court reiterated that the district court "must, of course, take care not to incorporate into the interim plan any legal defects in the state plan." *Id.* at 394.

b. On remand, in February 2012, the Texas district court ordered the use of revised interim plans for the 2012 elections (Plans C235 and H309). C.J.S. App. 367a-424a; H.J.S. App. 300a-315a. Both were compromise

plans accepted by the State and certain plaintiffs. C.J.S. App. 6a, 368a, 394a-395a.

With respect to congressional districting, Plan C235 made significant changes to nine districts as compared to the Legislature's 2011 plan. But it made no changes to the two congressional districts now at issue: CD27, a majority-Anglo district covering Nueces County (which includes Corpus Christi) and points northward; and CD35, a majority-Latino district extending from Travis County (Austin) to Bexar County (San Antonio). C.J.S. App. 408a, 419a.

Before 2011, CD27 had been a majority-Latino district that included Nueces County. The 2011 version of CD27 still included the concentration of Latino voters in Nueces County, but placed them in a majority-Anglo district. C.J.S. App. 417a. Various plaintiffs raised Section 2 claims and Section 5 arguments against the new CD27 (*id.* at 388a, 417a-423a), but the district court concluded that those challenges were unlikely to succeed under the standards articulated in *Perry*. The court found that, regardless of how CD27 was configured, "only 7 reasonably compact Latino opportunity districts c[ould] be drawn in compliance with § 2" in the "South and West Texas area." *Id.* at 418a, 421a. And the court explained that Plan C235 would restore a different district—CD23—as a Latino opportunity district, thereby ensuring that the plan had seven such districts. The court thus concluded that Plan C235 "substantially addresses the § 2 violation," and retention of the 2011 version of CD27 was appropriate in order to "respect[] the Legislature's policy decisions concerning the placement of Nueces County." *Id.* at 421a. The court also did not identify any retrogression concerns with CD27 under Section 5. Cf. *id.* at 399a, 422a-423a.

As to CD35, one group of private plaintiffs urged the district court to find it a proper Section 2 Latino opportunity district, while others urged the court to reject it as an unconstitutional racial gerrymander or as intentionally vote dilutive. The court concluded that the racial-gerrymandering claim was a "close call," C.J.S. App. 409a, but found that the challenge was likely without merit, both because of inadequate evidence that race had predominated in the creation of CD35 and because there was no substantial likelihood that CD35 would fail strict scrutiny in any event. *Id.* at 415a. The court also found that plaintiffs had not shown that CD35 was created for the discriminatory purpose of "dismantling" a prior "crossover" district (CD25) rather than because of "partisan politics." *Ibid.*[5]

With respect to the State House, in ordering the use of Plan H309, the district court made "substantial[]" changes to 21 districts. H.J.S. App. 314a. But Plan H309 retained 122 State House districts without change, including most of those now before this Court: HD54 and HD55 in Bell County; HD32 and HD34 in Nueces County; and HD103, HD104, and HD105 in Dallas County. *Id.* at 303a n.4. The court explained that by keeping those districts unchanged, it was "[f]ollowing [this] Court's direction to leave undisturbed any district that is free from legal defect." *Id.* at 303a.

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[5] A "crossover" district is "one in which minority voters make up less than a majority of the voting-age population," but in which the "minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett*, 556 U.S. at 13 (plurality opinion). A "coalition" district is one in which "two minority groups form a coalition to elect the candidate of the coalition's choice." *Ibid.*

Although the district court found that Plans C235 and H309 satisfied this Court's standards in *Perry*, it noted that its decisions were preliminary and not final rulings on the merits of any claim concerning the 2011 plans. C.J.S. App. 367a; H.J.S. App. 315a. The 2012 elections were conducted under Plans C235 and H309.

c. In August 2012, the D.C. district court denied preclearance to Texas's 2011 congressional and State House redistricting plans. See *Texas* v. *United States*, 887 F. Supp. 2d 133 (three-judge court), vacated and remanded, 133 S. Ct. 2885 (2013). As to the congressional plan, the court concluded that Texas had failed to meet its burden under Section 5 of the VRA to prove an absence of discriminatory intent. *Id.* at 159-166. As to the State House plan, the court concluded that Texas had failed to meet its burden under Section 5 to establish the absence of retrogressive effect, and also stated that the record suggested that that effect "may not have been accidental." *Id.* at 178; see *id.* at 166-178. The State appealed the denial of preclearance to this Court.

d. In March 2013—while Texas's preclearance appeal was pending, and while the litigation below was held in abeyance—the Texas Attorney General proposed to the Legislature that it enact the district court's 2012 interim maps as the State's permanent redistricting plans. C.J.S. App. 429a-435a. He observed that the 2011 plans had been found by the D.C. district court to be "tainted by evidence of discriminatory purpose," and explained that "the best way to remedy the violations * * * is to adopt the court-drawn interim plans as the State's permanent redistricting maps." *Id.* at 432a. In May 2013, the Texas Governor called the Legislature into special session to consider that proposal. C.J.S. Supp. App. 231a.

On June 23, 2013, the Texas Legislature passed bills adopting new redistricting plans. The Texas Legislature adopted without alteration the court-ordered congressional interim map (Plan C235) as its permanent congressional plan. C.J.S. App. 9a. The Legislature made minor changes to the court-ordered State House interim map and then enacted that map as its permanent State House plan (Plan H358). *Ibid.* The 2013 plans were signed into law on June 26, 2013, and became effective in September 2013. C.J.S. Supp. App. 232a.

e. On June 25, 2013, this Court issued its decision in *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), holding that the coverage formula in Section 4(b) of the VRA was unconstitutional and could "no longer be used as a basis for subjecting jurisdictions to preclearance" under Section 5. *Id.* at 2631. This Court then vacated the D.C. district court's judgment denying preclearance, 133 S. Ct. 2885, and on remand, that court granted Texas's motion for voluntary dismissal.

3. a. Litigation in the Texas district court resumed. The court allowed plaintiffs to amend their complaints to challenge the newly enacted 2013 plans and, with respect to existing claims against the 2011 plans, to seek relief under Section 3(c) of the VRA, 52 U.S.C. 10302(c). D. Ct. Doc. 886, at 8-19 (Sept. 6, 2013).[6] The court ordered, however, that the Legislature's newly enacted 2013 plans (Plans C235 and H358) would be used for the 2014 elections. *Id.* at 21-26. The court noted that it had

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[6] Section 3(c), known as the VRA's "bail-in" provision, permits a district court, upon a finding that "violations of the [F]ourteenth or [F]ifteenth [A]mendment justifying equitable relief have occurred within the territory of [a] State or political subdivision," to require the defendant to seek approval of future voting changes through a regime similar to Section 5 preclearance. 52 U.S.C. 10302(c).

"already" conducted "a preliminary injunction analysis" on plaintiffs' challenges in its decisions adopting the 2012 interim plans, *id.* at 22, and it found that the sole "new legal challenge" brought by plaintiffs (concerning HD90, which had been modified by the 2013 Legislature) was not likely to succeed, *id.* at 23-24. The court acknowledged it still needed to "reach a final decision on the merits of all claims," but concluded that it was "impossible to reach that decision prior to the various deadlines for the 2014 elections." *Id.* at 22.

The United States intervened in the litigation. D. Ct. Doc. 904 (Sept. 24, 2013). In its complaint, the United States did not challenge the 2013 plans, but instead argued that the 2011 plans (Plans C185 and H283) had been adopted with racially discriminatory intent in violation of Section 2 and that Section 3(c) relief was warranted. D. Ct. Doc. 907, at 14 (Sept. 25, 2013). The United States' complaint asserted only intentional vote-dilution claims, and did not raise any Section 2 results claims.

b. In July and August 2014, the Texas district court conducted bench trials on the claims against the 2011 congressional and State House plans. C.J.S. App. 13a.

In October 2015, while a decision on the 2011 plans was still pending, plaintiffs sought a preliminary injunction barring the use of the 2013 plans for the 2016 elections. The court denied that request, explaining that the 2013 plans were "the product of the [c]ourt's preliminary injunction analysis" in 2012, and concluding that "scrutinizing the same plan[s] under the same preliminary injunction analysis would [not] produce a different outcome today." D. Ct. Doc. 1324, at 5-6 (Nov. 6, 2015). The 2013 plans were therefore used for the 2016 elections.

c. Two-and-a-half years after trial, in various orders issued in March through May 2017, the district court held by a 2-1 vote that Texas had violated the VRA, the Constitution, or both in drawing various districts in the 2011 plans. C.J.S. App. 120a-366a; H.J.S. App. 88a-299a; see C.J.S. Supp. App. 1a-490a (separate findings of fact); H.J.S. Supp. App. 1a-309a (same).

As relevant here, with respect to the 2011 congressional plan, the district-court majority found that CD27 and CD35 were unlawful (notwithstanding the district court's prior provisional determinations to the contrary). C.J.S. App. 161a-195a, 330a. As to CD27, the court concluded that the placement of Hispanic voters in Nueces County into a majority-Anglo district "had the effect and was intended to dilute their opportunity to elect their candidate of choice." *Id.* at 330a. The court stated that, although only "seven compact Latino opportunity districts could be drawn in South/West Texas," "Nueces County Hispanics could be included in one of those districts for § 2 purposes." *Id.* at 181a. As to CD35, the court concluded that the district was an unconstitutional racial gerrymander, finding that race had predominated in its construction and that the district could not survive strict scrutiny. *Id.* at 175a. Judge Smith dissented, both on the ground that the challenges to the 2011 plans were moot and on the merits. *Id.* at 331a-366a.

With regard to the 2011 State House plan, the district-court majority found that plaintiffs had proven intentional vote dilution on a statewide basis and also in certain regions. H.J.S. App. 192a, 275a. The specific districts invalidated because of discriminatory intent included those in Nueces County (HD32 and HD34), Bell County (HD54 and HD55), and Dallas County (HD103, HD104, and HD105). *Id.* at 126a-137a, 164a-173a, 178a-

183a, 275a. Judge Smith again dissented on both mootness and the merits. *Id.* at 277a-299a.

After issuing those decisions on the 2011 plans, the district court held a trial on the 2013 plans in July 2017. Because the United States asserted no claims against the 2013 plans, it did not participate in the trial.

d. In decisions issued in August 2017, the district court invalidated several districts in the State's 2013 congressional and State House plans. See C.J.S. App. 3a-119a; H.J.S. App. 3a-87a.

As relevant here, the district court held that every district it had found to be intentionally discriminatory or racially gerrymandered in the 2011 plans was also necessarily unlawful in the 2013 plans "where th[e] district lines remain[ed] unchanged." C.J.S. App. 46a; see *id.* at 35a; H.J.S. App. 6a. The court acknowledged that the 2013 Legislature had effectively "adopted the [c]ourt's [interim] plans" from 2012, but reasoned that that action "d[id] not change" the analysis because the Legislature "did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." C.J.S. App. 40a. Based on that conclusion, the court suggested that the Legislature had enacted the 2013 plans "as part of a litigation strategy" designed to "insulate" the State's actions from further challenge, rather than as an attempt to "adopt legally compliant plans free from discriminatory taint." *Id.* at 40a-41a. Thus, as to the 2013 congressional plan, the district court invalidated CD27 and CD35, see *id.* at 117a-118a, and as to the 2013 State House plan, the court invalidated HD32 and HD34 (Nueces County), HD54 and

HD55 (Bell County), and HD103, HD104, and HD105 (Dallas County), see H.J.S. App. 84a-85a.[7]

Concluding that these violations "must be remedied," C.J.S. App. 117a; see H.J.S. App. 84a-85a, the district court directed the Texas Attorney General to advise the court "within three business days" whether the Texas Legislature would "take up redistricting in an effort to cure these violations." C.J.S. App. 118a; H.J.S. App. 86a. The court further ordered that, absent such legislative redistricting, it would hold "hearing[s] to consider remedial plans" in early September 2017. *Ibid.*

Texas sought emergency relief from this Court, which stayed the district court's orders invalidating the 2013 redistricting plans. Order, No. 17A225 (Sept. 12, 2017); Order, No. 17A245 (Sept. 12, 2017). Upon consideration of Texas's jurisdictional statements, this Court ordered briefing and postponed further consideration of the question of jurisdiction pending hearing of the case on the merits. Order, No. 17-586 (Jan. 12, 2018); Order, No. 17-626 (Jan. 12, 2018).

SUMMARY OF ARGUMENT

I. This Court possesses jurisdiction under 28 U.S.C. 1253, which allows direct appeals to this Court from an

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[7] The district court also invalidated HD90—a district newly drawn in the 2013 State House plan—as a racial gerrymander, and held that HD32 and HD34 were unlawful for the additional reason that they violated the Section 2 results test. See H.J.S. App. 85a. In addition, the court held that CD27 violated the Section 2 results test. C.J.S. App. 112a; see also *id.* at 180a-195a. The United States takes no position on those rulings. The United States did not assert any results claims in this litigation, and HD90 was revised in 2013 and thus does not involve the legislative adoption of a district provisionally approved by the district court—the principal issue addressed by the United States in this brief.

order granting or denying an interlocutory or permanent injunction in three-judge district-court actions under 28 U.S.C. 2284(a) challenging the constitutionality of congressional districts or statewide legislative apportionments. This Court has made clear in the analogous context of 28 U.S.C. 1292(a)(1) that even an order not styled as the grant or denial of an injunction is appealable if it has the "practical effect" of granting or denying an injunction, "might have a 'serious, perhaps irreparable, consequence,'" and "can be 'effectually challenged' only by immediate appeal." *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981). Under the unusual facts of this case, the district court's orders meet those standards. The orders had the effect of prohibiting further use of the State's 2013 congressional and State House plans; they had the serious consequence of requiring statewide redistricting on the eve of preparations for the 2018 election cycle; and, under the timing exigencies present here, the orders could only be effectually challenged by immediate appeal.

II. The district court committed errors of law in finding that the Texas Legislature engaged in intentional vote dilution in adopting Congressional District 27 and State House Districts 32, 34, 54, 55, 103, 104, and 105 in the 2013 plans, all of which were identical to districts contained in the court's own 2012 interim plans.

A. The principles for adjudicating claims of intentional vote dilution are well established. A legislative enactment may be invalidated on that basis only if the plaintiffs show that the legislature acted with a discriminatory purpose. In the redistricting context, as elsewhere, courts must accord a "presumption of good faith [to] legislative enactments." *Hunt* v. *Cromartie*, 526 U.S. 541, 553 (1999) (citation omitted). Courts must not

infer discriminatory racial intent solely from disparate racial effects, and a finding of past intentional discrimination standing alone generally cannot support an inference of intentional discrimination in a new enactment. And when, as here, a State adopts legislatively a new redistricting plan after a prior plan is held unlawful, the burden of proof rests on the plaintiff in any challenge to the new plan.

These principles also suggest a further principle: A court should afford particular weight to a state legislature's reliance on a court-ordered remedy. When a court has found in a reasoned decision that an interim plan redresses all likely violations of law, and when the state legislature permanently adopts that plan to replace its original enactment, the normal presumption of good faith accorded to legislative enactments is heightened by the State's acceptance of the judicial plan. Applying a strong presumption of good faith in this context would not direct an answer to the intent inquiry as a matter of law, but plaintiffs should bear a heavy burden in establishing that a state legislature's adoption of a court-ordered plan was intentionally discriminatory.

B. The district court erred in its analysis of intentional vote dilution. Instead of asking whether plaintiffs had proven that the 2013 Legislature adopted the 2013 plans with the purpose of harming minority voters, the court asked whether the State had shown that it removed the "taint of discriminatory intent" that in the court's view had "carr[ied] over" from the 2011 plans. C.J.S. App. 38a, 46a. But the lawfulness of the 2013 plans turns on the motivations of the 2013 Legislature, and plaintiffs—not the State—bore the burden of proof in that analysis.

C. The circumstances here confirm the soundness of applying a strong presumption of good faith. The 2013 Legislature's plans were identical, or nearly so, to the court-ordered interim plans. In adopting those interim plans after extensive evidentiary proceedings, the district court expressly considered under *Perry* v. *Perez*, 565 U.S. 388 (2012) (per curiam), and provisionally rejected, claims of intentional discrimination involving the same districts now at issue. And the court made numerous other ameliorative changes, which gave the Legislature good reason to believe that the interim plans would suffice to remedy any prior deficiencies.

The district court's orders and plaintiffs' jurisdictional-stage filings in this Court do not point to evidence that would rebut the strong presumption of good faith. The court perceived that Texas was motivated to pursue a legislative solution as a "strategy" to end the pending litigation. But such efforts at voluntary compliance presumptively further—not frustrate—Congress's goal of ameliorating unlawful discrimination. And the court identified no evidence showing that Texas acted with an intent to discriminate rather than an intent to adopt legally compliant plans.

III. The district court also erred in finding Congressional District 35 to be an unconstitutional racial gerrymander. The "predominant" consideration in setting the boundaries of CD35 in 2013 was not race, but rather whether they matched the boundaries provisionally deemed lawful in 2012. And the State had "good reasons" to believe that the Voting Rights Act required it to draw CD35 in 2011 and maintain it in 2013, including that the district court had found in 2012 that CD35 aided in complying with the State's obligations under

the VRA to draw seven Latino opportunity districts in South and West Texas.

ARGUMENT

I. THIS COURT MAY EXERCISE JURISDICTION OVER THESE APPEALS

A party may appeal directly to this Court "from an order granting or denying * * * an interlocutory or permanent injunction" in a civil action required to be adjudicated by a three-judge district court. 28 U.S.C. 1253. Under 28 U.S.C. 2284(a), a three-judge district court is required for actions "challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." Ordinarily, when a district court has not entered an order granting or denying an injunction, this Court lacks jurisdiction to enter a direct appeal. The Court has made clear in the analogous context of 28 U.S.C. 1292(a)(1), however, that even an order not styled as the grant or denial of an injunction is appealable if it (1) has the "practical effect" of granting or denying an injunction; (2) "might have a 'serious, perhaps irreparable, consequence'"; and (3) "can be 'effectually challenged' only by immediate appeal." *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981); see *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 287-288 (1988). In the circumstances presented here, the district court's August 15 and 24 orders meet those standards.

A. This case presents an unusual combination of extraordinary delays in the judicial proceedings followed by the equally extraordinary expedition of those proceedings on the eve of preparations for the upcoming election cycle. After Texas enacted the 2013 congressional and State House plans, plaintiffs promptly

amended their complaints to challenge them. But the trial on the 2013 plans was not held until July 2017, and the district court did not issue its decisions on those plans until mid-August 2017, even though Texas had previously informed the district court that its deadlines to begin preparations for the 2018 election cycle required that its plans be in place no later than October 1, 2017. See D. Ct. Doc. 1388, at 1-2 (May 1, 2017).[8] By the time the district court finally ruled, the 2013 plans (or the 2012 court-ordered plans on which they were based) had been used for three straight election cycles (2012, 2014, and 2016).

The district court's August 15 and August 24 orders held that the 2013 plans were unlawful and made clear that those plans would not be used for the upcoming 2018 elections. The court's orders found that the 2013 congressional and State House plans contained various "statutory and constitutional violations" and stated that those violations "must be remedied by either the Texas Legislature or this Court." C.J.S. App. 118a; H.J.S. App. 84a-85a (similar). The court then directed the Texas Attorney General to advise, within only "three business days," whether "the Legislature intends to

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[8] Texas advised the district court that pursuant to Texas Election Code § 14.001 (West 2017), election officials were required to mail voter election certificates on or after November 15, 2017, but before December 6, 2017. See D. Ct. Doc. 1388, at 2. The State indicated that October 1, 2017 was "the last possible date when individual voter-registration-templates must be provided by the Secretary of State to each of the 254 county election officials in the State of Texas." *Id.* at 1-2. The State's primary elections are scheduled for March 6, 2018.

take up redistricting in an effort to cure these violations." C.J.S. App. 118a; H.J.S. App. 86a.[9] The court further directed that "[i]f the Legislature does not intend to take up redistricting," the court would hold "hearing[s] to consider remedial plans" on September 5 and 6, 2017. *Ibid.* The court ordered that, in that event, "the parties must take immediate steps to consult with their experts and mapdrawers and prepare statewide * * * plans that remedy the violations." *Ibid.*

In these circumstances, the district court's orders were tantamount to injunctive relief. The court's significant delay, coupled with the impending deadlines and the remarkably compressed time frame to consider a possible legislative enactment, placed Texas in a difficult position: because the district court found the existing plans "unlawful" and ordered that they "must be remedied," Texas could be quite confident that the district court would not permit it to use those plans for the 2018 elections, even though the court had approved their use in prior years. Yet that consequence was not expressly stated in the form of an injunction. Had Texas been required to wait until the district court entered an express injunction, it would likely have come too late to afford Texas a reasonable opportunity under

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[9] That three-day response period was far shorter than is typically afforded to a state legislature, which this Court has stated should be given a "reasonable opportunity" to contemplate a possible legislative remedy before being compelled to proceed to remedial litigation. *Lawyer* v. *Department of Justice*, 521 U.S. 567, 576 (1997) (quoting *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978) (principal opinion)).

the circumstances for appellate review before deadlines associated with the 2018 election cycle.[10]

B. None of this Court's decisions compels a different result. In *Gunn* v. *University Committee to End the War in Viet Nam*, 399 U.S. 383 (1970), this Court held that it lacked jurisdiction under Section 1253 over a three-judge district-court order that declared a state law unconstitutional, but declined to enter an immediate injunction. That case, however, did not involve a redistricting suit under 28 U.S.C. 2284(a) or the timing considerations present here, and it cannot be said that the district court's liability determination in that case could only be effectually challenged by immediate appeal. Similarly, in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), this Court held in a footnote that it lacked jurisdiction under Section 1253 to entertain an appeal from an interlocutory liability determination in a redistricting case. *Id.* at 138 n.19; see *Whitcomb* v. *Davis*, 403 U.S. 914 (1971) (order dismissing appeal). But that case, too, did not involve the timing pressures present here, and the Court did not expressly consider whether the district court's liability ruling may have had the practical effect of an injunction.

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[10] We do not suggest that such preliminary deadlines in the election cycle should stand as an obstacle to relief on the merits if the Court were to find a violation of the VRA or the Constitution and if the considerations identified in *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006) (per curiam), for withholding relief close to an election are not yet present. As explained in the text, however, the delays and resulting compressed time frame are relevant for purposes of construing 28 U.S.C. 1253 and 2284(a), which provide for direct review of injunctions against statewide reapportionment plans to ensure prompt resolution of challenges to such plans and to accord respect for acts of a state legislature.

II. THE DISTRICT COURT ERRED IN ITS ANALYSIS OF INTENTIONAL VOTE DILUTION IN THE 2013 CONGRESSIONAL AND STATE HOUSE PLANS

On the merits, the Court should correct the legal errors underlying the district court's rulings that the Texas Legislature engaged in intentional vote dilution in 2013 when it adopted Congressional District 27, and State House Districts 32, 34, 54, 55, 103, 104, and 105, without change from the court's own 2012 interim plans. The court rested its rulings on determinations that the State's original 2011 plans were tainted with "discriminatory intent" and that the Legislature failed to "cleanse" that intent in enacting its new 2013 plans. C.J.S. App. 44a. But in deciding whether the 2013 plans were intentionally discriminatory, the court should have evaluated the intent of the 2013 Legislature, and should have applied the familiar principles for discerning the intent of a legislative body, which include a presumption of good faith. That presumption should be particularly strong here, because the Legislature enacted the interim plans adopted by the district court. Viewed under the correct legal framework, the evidence invoked by the district court, and discussed by plaintiffs in their motions to dismiss or affirm in this Court, would not be sufficient to overcome that strong presumption of good faith and to establish discriminatory intent.

A. Plaintiffs' Claims Of Intentional Vote Dilution Require Them To Show That The 2013 Legislature Acted With A Discriminatory Racial Purpose

Plaintiffs claim that the 2013 plans (Plans C235 and H358) intentionally diluted the voting strength of minority voters in several districts in violation of Section 2 of the VRA and the Fourteenth Amendment. The

principles for adjudicating those claims are well established.

1. A legislative enactment may be invalidated on grounds of intentional discrimination only if the legislature "acted with a discriminatory purpose." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997). "'Discriminatory purpose' * * * implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 279 (1979) (citation omitted). Thus, "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." *Id.* at 272.

The inquiry into a legislature's motivation is an "inherently complex endeavor." *Hunt* v. *Cromartie*, 526 U.S. 541, 546 (1999). "Outright admissions of impermissible racial motivation are infrequent." *Id.* at 553. More commonly, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); see *Rogers* v. *Lodge*, 458 U.S. 613, 618 (1982) (recognizing that "an invidious discriminatory purpose" may often be "inferred from the totality of the relevant facts") (quoting *Washington* v. *Davis*, 426 U.S. 229, 242 (1976)). The determination of a legislature's motivation, though guided by legal principles, is ultimately an issue of fact. See *Hunt*, 526 U.S. at 549 ("The legislature's motivation is itself a factual question.").

In *Arlington Heights*, this Court set forth several considerations in analyzing "whether invidious discriminatory purpose was a motivating factor" in a government body's decisionmaking. 429 U.S. at 266; see *Bossier Parish*, 520 U.S. at 481 (noting that *Arlington Heights* "serve[s] as the framework for examining discriminatory purpose in cases brought under the Equal Protection Clause"). Under this framework, courts consider (1) whether the "impact of the official action * * * bears more heavily on one race than another"; (2) "the historical background of the decision"; (3) "[t]he specific sequence of events leading up to the challenged decision"; (4) any "[d]epartures from the normal procedural sequence"; and (5) "[t]he legislative or administrative history, especially . . . [any] contemporary statements by members of the decisionmaking body." *Bossier Parish*, 520 U.S. at 489 (quoting *Arlington Heights*, 429 U.S. at 266-268) (brackets in original). This Court has repeatedly applied this framework to assess legislative intent in the context of challenges to state redistricting plans. See *Hunt*, 526 U.S. at 546-549; *Shaw* v. *Reno*, 509 U.S. 630, 644 (1993) (*Shaw I*); *Rogers*, 458 U.S. at 618.

In performing this inquiry, the burden rests on the "plaintiff" to "establish that the State * * * acted with a discriminatory purpose." *Bossier Parish*, 520 U.S. at 481; cf. *Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005) (recognizing that the burden of proof generally rests on the party alleging a violation of federal law); *Voinovich* v. *Quilter*, 507 U.S. 146, 155-156 (1993) ("Section 2, however, places at least the initial burden of proving an apportionment's invalidity squarely on the plaintiff's shoulders."). If, and only if, a plaintiff proves intentional discrimination does the burden shift to the defendant to establish any available defense, such as by

showing that it would have taken the same action for valid reasons even absent impermissible discrimination. See *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 285-286 (1977).

2. The Court has recognized several additional principles relevant to adjudicating claims of unlawful racial intent in the context of state legislative redistricting.

First, this Court has emphasized in the redistricting context that courts must accord a "presumption of good faith [to] legislative enactments." *Hunt*, 526 U.S. at 553 (quoting *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995)). The Court has explained that "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915, because legislative apportionment is "primarily the duty and responsibility of the State," *Shelby County* v. *Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *Perry* v. *Perez*, 565 U.S. 388, 392 (2012)) (per curiam); see *Cooper* v. *Harris*, 137 S. Ct. 1455, 1463 (2017) ("The Constitution entrusts States with the job of designing congressional districts."). For that reason, "courts must 'exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.'" *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quoting *Miller*, 515 U.S. at 916).

Second, this Court has explained that, although inquiry into the effects of a challenged action "may provide an important starting point" for analysis, "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Arlington Heights*, 429 U.S. at 264-266 (citing *Davis*, 426 U.S. at 242); see also, *e.g.*, *Coleman* v. *Court of Appeals*, 566 U.S. 30, 42 (2012) (plurality opinion). Thus, a State's

decision to "choose a redistricting plan that has a dilutive impact does not, without more, suffice to establish that the jurisdiction acted with a discriminatory purpose." *Bossier Parish*, 520 U.S. at 487-488; cf. *Miller*, 515 U.S. at 914 (stating in racial-gerrymandering context that "impact alone" is usually "not determinative, and the Court must look to other evidence of race-based decisionmaking").

Third, this Court has recognized that a finding of intentional discrimination in a prior legislative enactment is ordinarily insufficient, standing alone, to support an inference of intentional discrimination in a later enactment. "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion). Of course, "[t]he historical background" to a challenged enactment is a relevant consideration, *Arlington Heights*, 429 U.S. at 267, including evidence pertaining to events that are "reasonably contemporaneous with the challenged decision," *McCleskey* v. *Kemp*, 481 U.S. 279, 298 n.20 (1987). But even when a prior finding of intentional discrimination was recent, "[t]he ultimate question" under *Arlington Heights* must be "whether a discriminatory intent has been proved in [the] given case"—that is, for the particular challenged enactment. *City of Mobile*, 446 U.S. at 74 (plurality opinion).

Fourth, this Court's decisions indicate that, when a State enacts a new redistricting plan in response to a judicial order holding a prior plan unconstitutional, the plaintiff retains the burden of proof in any challenge to the State's new plan. This Court has long recognized that when a federal court has determined that a new apportionment is required, a State "should be given the

opportunity to make its own redistricting decisions so long as that is practically possible." *Lawyer* v. *Department of Justice*, 521 U.S. 567, 576 (1997); see *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978) (principal opinion). And even when practical necessities dictate the implementation of a court-drawn map in the first instance, States nonetheless remain "free to replace court-mandated remedial plans by enacting redistricting plans of their own." *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 416 (2006) (*LULAC*) (opinion of Kennedy, J.); see *Wise*, 437 U.S. at 540 (principal opinion); *Burns* v. *Richardson*, 384 U.S. 73, 85 (1966). When a State avails itself of that opportunity, "[t]he new legislative plan * * * will then be the governing law unless it, too, is challenged and found to violate the Constitution." *Wise*, 437 U.S. at 540 (principal opinion); accord *id.* at 548 (opinion of Powell, J., joined by three other Justices concurring in part and concurring in the judgment); *id.* at 550 (Marshall, J., dissenting, joined by two other Justices) (agreeing with the relevant portion of the principal opinion); see also *Mississippi State Chapter, Operation PUSH, Inc.* v. *Mabus*, 932 F.2d 400, 408-409 (5th Cir. 1991) (holding that plaintiff had failed to "establish[] that the Mississippi Legislature" had "a racially discriminatory purpose" in enacting its legislative remedy for a Section 2 violation).

3. The foregoing principles, taken together, suggest a further principle. In considering the "historical background" and "specific sequence of events" leading to a revised legislative action, *Arlington Heights*, 429 U.S. at 267, a court should afford particular weight to a state legislature's reliance on a court's determination that a particular remedy is both necessary and likely sufficient to cure a legal violation. When, as here, a court has found

that an interim plan is sufficient to redress all likely violations of law, and when the state legislature permanently adopts that plan to replace its original enactment, the normal presumption of good faith accorded to legislative enactments is heightened by the State's acceptance of the judicial plan. Courts should operate from a strong presumption that the state legislature's adoption of the judicially approved remedy was due to good-faith compliance efforts rather than sinister motives.

Applying a strong presumption of good faith in this context would not direct an answer to the intent inquiry as a matter of law. Even when a state legislature permanently adopts a remedy that a court has provisionally declared to be lawful, a plaintiff may attempt to prove that the legislature adopted that remedy not in good faith, but rather for the purpose of harming racial minorities and perpetuating unlawful discrimination. Cf. *Hayden* v. *Paterson*, 594 F.3d 150, 167 (2d Cir. 2010) (contemplating the "possibility that a legislative body might seek to insulate from challenge a law known to have been originally enacted with a discriminatory purpose"). The legislature's adoption of a court-ordered plan cannot immunize a State from all possible liability, including for intentional wrongdoing when it exists. Cf., *e.g.*, *LULAC*, 548 U.S. at 416 (opinion of Kennedy, J.) ("Judicial respect for legislative plans * * * cannot justify legislative reliance on improper criteria for districting determinations."); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) (recognizing that courts "need not * * * accept at face value assertions of legislative purposes" if "examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation"). Plaintiffs should bear a heavy burden, however, in establishing

that a state legislature's adoption of a court-ordered plan was intentionally discriminatory.

B. The District Court Incorrectly Presumed Discriminatory Intent And Shifted The Burden Of Proof To The State

Rather than applying the settled framework for intentional vote-dilution claims, the district court undertook a fundamentally different analysis. The court did not ask whether plaintiffs had proven that the Legislature, in enacting the 2013 plans, acted with the purpose of harming minority voters. Instead, the court asked whether the State had shown that it had removed the "taint of discriminatory intent" associated with certain districts in its 2011 plans. C.J.S. App. 38a.[11] The court's analysis reflects several legal errors.

1. First, the district court incorrectly assumed that discriminatory intent associated with old legislation persists into new litigation unless that prior intent is confronted and somehow affirmatively extirpated. The court faulted the Legislature for not undertaking a "deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." C.J.S. App. 40a. The court concluded that, in light of that failure, "the racially discriminatory intent * * * that it previously found in the 2011 plans carr[ied] over into the 2013 plans where those district lines remain unchanged." *Id.*

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[11] The district court briefly recited the *Arlington Heights* framework in the background of its opinion, see C.J.S. App. 27a, but its analysis did not follow that framework. The sole arguable application of *Arlington Heights* appeared in a footnote, in which the district court observed that the "history of discrimination" in Texas "support[ed]" the court's findings under its taint analysis. *Id.* at 38a-39a n.27.

at 46a; see *id.* at 117a (same); H.J.S. App. 6a (incorporating same analysis).

That presumption of persistent discriminatory intent is inconsistent with the analysis required by this Court's decisions. See pp. 26-30, *supra*. It also makes little sense. Whether intentional discrimination existed in enacting the 2013 redistricting plans is a question about the motives of the 2013 Legislature. Although under *Arlington Heights* as applied in the redistricting context, a history of prior discrimination by a state or local legislative body can be relevant, the central inquiry is whether the legislature that enacted the particular law at issue did so for an impermissible purpose.[12] Legislative intent is not an artifact that "carr[ies] over" from one law to the next; it must be decided anew with each successive enactment. See, *e.g.*, *City of Mobile*, 446 U.S. at 74 (plurality opinion) (inquiring "whether a

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[12] In its jurisdictional statement, Texas appears to contend (C.J.S. 25-28) that the district court impermissibly relied on factual findings about the 2011 Legislature's intent because claims concerning the 2011 plans were moot. Regardless of whether the claims concerning the 2011 plans were moot, the district court was not foreclosed, under the *Arlington Heights* analysis in this redistricting context, from considering the "historical background of" and "sequence of events leading up to" enactment of the 2013 redistricting plans, including whether the 2011 Legislature acted with discriminatory intent. But the pertinent question is whether the *2013 plans* were unlawful, and those plans are entitled to a strong presumption of validity because the Texas Legislature enacted the court's own interim plans with little or no change. As explained below, evidence concerning the 2011 plans alone is not sufficient to overcome that presumption and establish impermissible intent on the part of the 2013 Legislature, and neither the district court nor plaintiffs in their motions to dismiss or affirm have identified other evidence that does so. See pp. 40-44, *infra*.

discriminatory intent has been proved" as to the particular enactment at issue, because "past discrimination cannot * * * condemn governmental action that is not itself unlawful"); cf. *Palmer* v. *Thompson*, 403 U.S. 217, 225 (1971) (contemplating that a law invalidated because of improper motive might "be valid" if the legislature "repassed it for different reasons").

In support of its belief that the discriminatory intent from 2011 "carr[ied] over" into 2013, the district court invoked this Court's decision in *Hunter* v. *Underwood*, 471 U.S. 222 (1985). See C.J.S. App. 35a ("With regard to those areas in Plan C185 and Plan H283 where the Court found that [the] district lines were drawn with impermissible motive * * * , *Hunter* indicates that those portions of the plans remain unlawful."). But *Hunter* did not involve a subsequent legislative enactment at all. Rather, the question was whether a 1901 provision of the Alabama Constitution, which provided for the disenfranchisement of persons "convicted of, among other offenses, 'any crime . . . involving moral turpitude,'" was invalid because it had been adopted with the purpose of disenfranchising black voters. 471 U.S. at 223. In defending the constitutionality of that provision, Alabama urged that the passage of time, coupled with intervening judicial rulings narrowing the predicate crimes giving rise to disenfranchisement, had vitiated any intentional discrimination.

This Court rejected that proposition, explaining that the prior judicial invalidation of "[s]ome of the more blatantly discriminatory selections" of crimes (including "miscegenation") did not cure the intentional discrimination motivating other then-surviving provisions. *Hunter*, 471 U.S. at 233. But *Hunter* specifically contemplated that a different analysis would apply if the

challenged provisions had been reenacted at a later time, and reserved the question whether the challenged provision "would be valid if enacted today without any impermissible motivation." *Ibid.*; see *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 465 n.17 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (describing *Hunter* as "h[olding] that extant laws originally motivated by a discriminatory purpose continue to violate the Equal Protection Clause, even if they would be permissible were they reenacted without a discriminatory motive"); *Cotton* v. *Fordice*, 157 F.3d 388, 391 (5th Cir. 1998) (noting that *Hunter* "left open the possibility that by amendment, a facially neutral provision * * * might overcome its odious origin").

Consistent with that understanding of *Hunter*, several courts of appeals have recognized that, when a State reenacts a particular voting provision that was intentionally discriminatory when first enacted, the ultimate focus in any subsequent litigation must be the intent of the reenacting legislature, not the original one. See *Hayden*, 594 F.3d at 166-167 (addressing felon-disenfranchisement law); *Johnson* v. *Governor*, 405 F.3d 1214, 1223-1224 (11th Cir.) (en banc) (same), cert. denied, 546 U.S. 1015 (2005); *Cotton*, 157 F.3d at 391-392 & n.7 (same); *Chen* v. *City of Houston*, 206 F.3d 502, 520-521 (5th Cir. 2000) (addressing racial-gerrymandering claim), cert. denied, 532 U.S. 1046 (2001). Those courts also have rejected the proposition that prior intent "remains legally operative" unless and until some affirmative contrary showing is made. *Johnson*, 405 F.3d at 1223; see *Hayden*, 594 F.3d at 166-167 (quoting and citing *Johnson* with approval); accord *Cotton*, 157 F.3d at 392 (reaffirming that plaintiff was required to

show that the "*current* version" of the law was "adopted out of a desire to discriminate") (emphasis added).[13]

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[13] The district court declared that the "most relevant case" supporting its analysis was *Chen* v. *City of Houston*, *supra*, but that decision is fully consistent with the above-stated principles. C.J.S. App. 35a; cf. *id.* at 35a-39a. In *Chen*, the plaintiffs alleged that the City's 1997 districting plan was a racial gerrymander insofar as it "substantially maintained the borders of previous plans" from 1991, 1993, and 1995 in which race had allegedly predominated. 206 F.3d at 513. The Fifth Circuit explained that, although "evidence of intent garnered from [those] prior plans" was relevant, "the state of mind involved in the prior plans [was] not of itself what is precisely and directly the ultimate issue before the [c]ourt in this case." *Id.* at 521. Rather, the court recognized that the "state of mind of the reenacting body" controls the analysis, and observed that the "intervening reenactment with meaningful alterations may render the current law valid" even if the prior law was unconstitutional. *Ibid.* The court also applied a "presumption in favor of the Council's good faith," *id.* at 520, and ultimately found that race had not predominated either in 1997 or in the prior years at issue.

The district court also invoked *Kirksey* v. *Board of Supervisors*, 554 F.2d 139 (5th Cir.) (en banc), cert. denied, 434 U.S. 968 (1977), which reasoned that the "benign nature" of a new redistricting plan "cannot insulate the redistricting government entity from the existing taint" of a prior "intentional and purposeful discriminatory denial of access." *Id.* at 146-147; see C.J.S. App. 33a n.34, 45a. But *Kirksey* dates from the pre-*City of Mobile* era in which the Fifth Circuit had concluded that a constitutional vote-dilution claim could be proven by *either* discriminatory purpose *or* discriminatory effects. Cf. *Jones* v. *City of Lubbock*, 727 F.2d 364, 369, 377-378 (5th Cir. 1984) (describing history). And to the extent "th[e] [*Kirksey*] court determined that a [constitutional] voting dilution case did not necessarily require intent where a political system demonstrably continued the effects of historical discrimination," the Fifth Circuit later rejected that approach, recognizing that a constitutional vote-dilution claim must "satisfy the purpose standard generally applicable in equal protection cases." *Id.* at 377.

2. In imposing a legal obligation on the Legislature to "ensure that the 2013 plans cured any taint from the 2011 plans," C.J.S. App. 40a, the district court also effectively shifted the burden of proof to Texas. As explained above, the burden rests on the "plaintiff[s]" to "establish that the State * * * acted with a discriminatory purpose." *Bossier Parish*, 520 U.S. at 481. Although the court did not expressly state that it was shifting the burden of proof, its conclusions that "[t]he discriminatory taint was *not removed by the Legislature's* enactment of the Court's interim plans," C.J.S. App. 46a (emphasis added), and that "the *Legislature did not engage* in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans," *id.* at 40a (emphasis added), rest on the evident assumption that it was the State's obligation to disprove discriminatory intent in 2013 rather than plaintiffs' obligation to prove it.[14] In shifting that burden, the district court overrode the strong "presumption of good faith" that the State's enactments should have enjoyed in these circumstances. *Miller*, 515 U.S. at 916; see p. 27, *supra*.

The district court suggested that, absent a burden on Texas to show it has "removed" its prior bad intent, the 2013 plans would be "insulate[d]" from challenge and plaintiffs would have "no remedy" for any "discrimination or unconstitutional effects" in those plans. C.J.S. App. 44a-45a & n.45. That is incorrect: plaintiffs here could have attempted to prove their case in the same

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[14] The district court's burden-shifting was invited by some plaintiffs, who argued that the "State has the burden [in the litigation] to prove that its chosen remedy cures all of the defects found by the Court" in the 2011 plan. D. Ct. Doc. 1525, at 49 (July 31, 2017) (MALC post-trial brief); see *id.* at 21, 40-42.

way as all other similarly situated plaintiffs in redistricting cases—namely, by establishing that the *2013 Legislature* enacted the *2013 plans* for impermissible racial purposes. And to do that, because the Legislature adopted court-ordered remedial plans, plaintiffs should be required to adduce particularly persuasive evidence in order to surmount the presumption that the Legislature acted lawfully. But the possibility that a legislature might act with nefarious motives in enacting a court-approved plan cannot justify relieving plaintiffs of their burden to show that those motives exist.[15]

C. This Court Should Reject The Basis For The District Court's Findings Of Intentional Discrimination

It was only by relying on the flawed premises described above that the district court reached its conclusion that the 2013 plans were the unlawful product of intentional discrimination. Although the determination of legislative motive is a "factual question," *Hunt*, 526 U.S. at 549, this Court retains "full power to correct a court's errors of law," including any "legal mistake[s]" underlying factual findings. *Cooper*, 137 S. Ct. at 1464-1465, 1474; see *LULAC*, 548 U.S. at 427 ("Where 'the ultimate finding of dilution' is based on 'a misreading of the governing law' * * * there is reversible error.")

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[15] The district court's "insulat[ion]" concern also reflects its conflation of the concepts of discriminatory *intent* and unlawful vote-dilutive *effect*. Although success on plaintiffs' intentional vote-dilution claims would require proof that the 2013 Legislature acted for a discriminatory purpose, plaintiffs' Section 2 "results" claims require no such showing. See pp. 4-5, *supra*. Thus, as Texas has acknowledged, the fact that a re-enacting legislature does not act with unlawful intent does not foreclose the possibility that "impermissible discriminatory *effect* may be carried over * * * from one version of a law to another." C.J.S. 17.

(quoting *Johnson* v. *De Grandy*, 512 U.S. 997, 1022 (1994)). This Court should correct those legal errors.

1. Application of a strong presumption of good faith is appropriate in this case

The circumstances of this case confirm the soundness of applying a strong presumption that the Legislature did not act with an impermissible racial purpose in adopting the 2013 redistricting plans.

First, the 2013 Legislature enacted plans that were either identical (for the congressional plan) or nearly identical (for the State House plan) to the interim plans that the district court ordered to be used for the 2012 elections. A legislature's adoption, entirely or substantially without amendment, of plans that have received judicial approval indicates the legislature's reliance on the district court's factual and legal determinations that those plans are likely lawful.

Second, in approving the 2012 interim plans, the district court expressly considered each of plaintiffs' challenges under this Court's *Perry* decision and concluded that they either were "insubstantial" or had no "likelihood of success." *Perry*, 565 U.S. at 394-395. The three-judge district court's approval of the districts that were unchanged from the 2011 plan to the 2012 interim plan was based on extensive evidentiary proceedings, including a ten-day trial in 2011; a three-day hearing in 2011 regarding the first set of interim maps; a two-day hearing in 2012 concerning the revised set of interim maps on remand from *Perry*; and the court's review of post-trial briefing from the nine-day preclearance trial in the D.C. district court. C.J.S. App. 380a. The district court's evaluation of plaintiffs' claims under *Perry*, and its determination that the 2012 interim plans were law-

ful under that standard, gave the Legislature good reason to believe that the court's 2012 interim plans were a lawful basis for the 2013 plans.

As to the congressional plan, the district court found that CD27 likely did not violate Section 2 of the VRA because the court had restored CD23 as a Latino opportunity district. C.J.S. App. 421a. With respect to CD35, the court found that race had not predominated in its creation and that the district would not fail strict scrutiny in any event. *Id.* at 409a-415a. The court likewise stated that in preserving the unaltered districts in the State House plan, it was "following the Supreme Court's direction to leave undisturbed any district that is free from legal defect." H.J.S. App. 303a (citing *Perry*, 565 U.S. at 393-394). The court thus adopted the 2012 interim plans only after considering, albeit preliminarily, the merits of all pending VRA and constitutional challenges.

Third, the district court's 2012 interim plans made numerous ameliorative changes to other districts, which supported the Legislature's conclusion that the interim plans had likely cured any defects in the 2011 plans. The interim congressional plan made significant changes to nine congressional districts, which included restoring CD23 as a Latino opportunity district. C.J.S. App. 417a-421a. The court concluded that the restoration of CD23 "substantially addresse[d]" any Section 2 violation involving Latino voters in South and West Texas, including those residing in Nueces County (CD27). *Id.* at 421a. After that change, there were at least eleven congressional districts in the 2012 interim plan in which minority voters had the opportunity to elect their candidates of choice, as opposed to only ten such districts in the 2011 plan. *Id.* at 297a, 399a.

Similarly, in the interim State House plan, the district court made "substantial[]" changes to 21 State House districts. H.J.S. App. 314a. The number of minority opportunity districts in the State House plan was thereby increased from 45 or 46 in the 2011 map to at least 50 in the 2013 map. See 11-cv-1303 Docket entry No. 79-2, at 8 (D.D.C. Oct. 25, 2011) (comparing numbers in 2011 map to those in benchmark pre-2011 map); H.J.S. App. 308a-309a (noting that 2012 interim plan "offset" any "retrogression" in the 2011 plan).

Fourth, the court-ordered 2012 plans were created as compromise maps acceptable to both the State and to several plaintiffs. C.J.S. App. 6a, 368a; see D. Ct. Doc. 660 (Feb. 16, 2012) (joint advisory filed by defendants and by the Texas Latino Redistricting Task Force plaintiffs proposing interim congressional plan); D. Ct. Doc. 668 (Feb. 21, 2012) (same for interim State House plan).[16] That some (although not all) plaintiffs approved of the interim plans further supports the reasonableness of the Legislature's belief that those plans were lawful.

2. Neither the district court nor plaintiffs' filings to date in this Court have identified sufficient evidence to rebut the strong presumption of good faith

The district court's orders and the plaintiffs' jurisdictional-stage filings in this Court do not point to evidence that would be sufficient to rebut the strong

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[16] Although the Texas Latino Redistricting Task Force plaintiffs had alleged that the 2011 State House and congressional plans "dilut[ed] Latino voting strength statewide," D. Ct. Doc. 68, ¶ 21 (July 25, 2011), those plaintiffs brought no challenges to the 2013 congressional plan, and as to the 2013 State House plan those plaintiffs challenged only a single district (HD90, which was modified in 2013 from the district court's interim plan). C.J.S. App. 12a-13a.

presumption of good faith that applies to the 2013 Legislature's re-adoption of the unchanged districts from the district court's interim plan. The district court relied on its assessment that the "Legislature did not adopt the [2012 interim] plans with the intent to adopt legally compliant plans free from discriminatory taint," C.J.S. App. 40a, but rather as a "litigation strategy designed to insulate the 2011 or 2013 plans from further challenge," *id.* at 41a. Plaintiffs endorse that rationale in their filings in this Court. See 17-586 Mot. to Dismiss 12, 21 n.9; 17-626 MALC Mot. to Dismiss 29. But those assertions appear not to rest on evidence, but rather on a misunderstanding of the law.

To the extent Texas adopted the 2013 plans with a view to resolving existing litigation against the 2011 plans, it is unclear why the district court regarded that strategy as inherently pernicious. An intent to end litigation, without more, is not an intent to discriminate. Indeed, the best way to end litigation is to adopt a redistricting plan that complies with the Voting Rights Act and the Constitution. And if a federal court has provisionally determined that a particular action is unlawful and imposes an interim remedy, and if a legislature permanently adopts that remedy in lieu of continuing to contest the lawfulness of the original action, the State's acceptance of the judicial plan presumptively furthers—not frustrates—Congress's goal in enacting the VRA of ameliorating unlawful discrimination.

Moreover, even when a State replaces a judicial remedy without fully adopting it, this Court's decisions require that federal courts treat such plans with deference. See pp. 28-29, *supra*. It follows that a State that enacts a court-approved plan in order to obviate a need for litigation concerning prospective compliance should

receive, at a minimum, the same deference. Were the law otherwise, every state legislative remedy undertaken against the backdrop of redistricting litigation would be presumptively improper, in contravention of this Court's "presumption of good faith" for state legislative enactments, *Miller*, 515 U.S. at 915, and its encouragement of state legislative remedies, *Wise*, 437 U.S. at 540 (principal opinion). Cf. *Ricci* v. *DeStefano*, 557 U.S. 557, 581 (2009) (recognizing value of "voluntary compliance" in Title VII context).

In any event, the district court did not identify the evidence that it believed supported its assertion that the 2013 Legislature acted with an intent to discriminate rather than an "intent to adopt legally compliant plans." C.J.S. App. 40a. Rather, the court's statement appears to rest on its mistaken belief that the Legislature was under an affirmative obligation to undertake a "deliberative process to ensure that the 2013 plan cured any taint from the 2011 plans," *ibid.*, and an ensuing inference that the Legislature's failure to discharge that obligation was proof of ill motive. But to the extent that the 2013 Legislature relied on the district court's legal and factual judgments rather than second-guessing them, such reliance is more naturally understood as a sign of good faith. Indeed, the Legislature's refusal to adopt significant changes is consistent with a legislative intent to avoid creating (even inadvertently) new violations of the VRA.

The district court also cited evidence that the Legislature's counsel, Jeff Archer, advised legislators that the district court's 2012 findings were preliminary and therefore not "full determinations" on the merits of every claim. C.J.S. App. 43a; see 17-586 Mot. to Dismiss 21 (relying on same evidence). But the district court's

orders on the 2012 interim plans were, at a minimum, highly relevant in assessing Texas's legal obligations and the likely merits of plaintiffs' claims. The fact that the Legislature knew that the court-ordered interim maps were not based on a final adjudication of plaintiffs' claims concerning the 2011 plans, and yet adopted those maps anyway, can quite reasonably be understood as reflecting the Legislature's judgment that the court-ordered maps provided the best evidence available as to what remedial plans would comply with federal law.[17] But in any event, the non-final nature of the district court's determinations underlying its interim plans is not, without more, affirmative evidence of discriminatory intent.

The district court also observed that the 2013 Legislature had "steadfast[ly] refus[ed]" to consider the possibility of drawing new "coalition" districts, which the district court had earlier found "could be required" by the VRA. C.J.S. Pet. App. 40a; cf. p. 10 n.5, *supra*. But the Legislature may have believed that the necessary factual predicate, including proof of cohesive voting among Hispanic and African-American voters, did not exist to require drawing new coalition districts. This Court had stated in *Perry* that if the district court, in adopting its 2011 interim plans, had set out to create a

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[17] Texas's post-trial briefing before the district court cited several pieces of record evidence consistent with this understanding. See, *e.g.*, JX-10.4 at 26 (Representative Drew Darby, Chairman, House Select Committee on Redistricting) ("[T]he interim maps represent the District Court's best judgment as to * * * fully legal and constitutional redistricting plans."); JX-13.4 at 151 (Representative Travis Clardy, Member, House Select Committee on Redistricting) ("[I]nterim means interim, I understand that, but it's a good, fair map drawn by three hard-working impartial federal judges who are very well acquainted with the law. Don't you think it's reasonable that * * * we use those maps?").

minority coalition district, "it had no basis for doing so." 565 U.S. at 399. The district court also did not include any new coalition districts in its 2012 interim plans. And the district court ultimately rejected plaintiffs' claims that the Legislature should have created additional coalition districts in 2013. See H.J.S. App. 7a, 9a-12a, 14a, 16a, 20a-22a, 24a-26a, 85a; C.J.S. App. 49a-51a, 53a-85a.

Finally, the district court noted that the 2013 Legislature "pushed the redistricting bills through quickly in a special session," C.J.S. App. 40a, which began on May 27, 2013, and ended on June 25, 2013. But the Governor convened a special session only because the Legislature had ended its regular session in May 2013 without any new redistricting plans to replace the 2011 plans, for which the D.C. district court had denied preclearance. And because the Legislature sits in regular session for only 140 days every two years, see Tex. Const. art. III, §§ 5(a), 24(b), a special session was necessary if the Legislature was to adopt new redistricting plans before the 2014 elections. The "quick[ness]" of the special session may reflect only that "no [special] session shall be of longer duration than thirty days." *Id.* § 40.

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT CONGRESSIONAL DISTRICT 35 IS AN UNCONSTITUTIONAL RACIAL GERRYMANDER

A. This Court applies a two-step analysis in determining whether a State has violated the Equal Protection Clause through racial gerrymandering. At the first step, plaintiffs must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without" a particular district. *Alabama Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1267 (2015) (citation omitted). At the second step, the burden shifts to the State to

"prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper*, 137 S. Ct. at 1464 (quoting *Bethune-Hill*, 137 S. Ct. at 800). When a State invokes compliance with the Voting Rights Act as the "compelling interest" justifying its race-based apportionment, it must show that it had "'good reasons'" for concluding that its actions were required by the VRA. *Ibid.* (quoting *Alabama*, 135 S. Ct. at 1274).

B. The district court erred in finding a racial gerrymander in CD35. As an initial matter, the 2013 Legislature adopted CD35 in its present form in 2013 because that district had received judicial endorsement in the court-ordered interim congressional plan. Thus, the "predominant" consideration in establishing the boundaries of CD35 in 2013 was that they matched the district provisionally deemed lawful by the three-judge court.

In any event, the State had "good reasons" to believe that the VRA required it to draw CD35 in 2011 and maintain it in 2013. *Cooper*, 137 S. Ct. at 1464. The district court's own decision in 2012 concluded that Texas had good reasons for drawing CD35 as it did. Although the district court provisionally concluded in 2012 that race did not predominate in drawing the district, it also found that "[p]laintiffs [had not] demonstrated a substantial likelihood that CD35 would fail a strict scrutiny analysis [even] if strict scrutiny applies." C.J.S. App. 415a. The court noted that Texas had defended CD35 in the preclearance proceedings as a "minority opportunity district," *id.* at 411a, and it observed that CD35 had been designed to have a "Hispanic majority" with "'above 50 percent of [Hispanic citizen voting age population],'" *ibid.* (citation omitted). Indeed, the court counted CD35 among the seven "Latino opportunity

districts" that it perceived as necessary to satisfy plaintiffs' Section 2 "results" claims in South and West Texas. *Id.* at 409a. Although the district court's approval of CD35 in 2012 was provisional, that endorsement provided at least "breathing room" for Texas to conclude, in 2013, that CD35 addressed a VRA need and that maintaining it would not violate the Equal Protection Clause. *Cooper*, 137 S. Ct. at 1464 (citation omitted).

In addition to the district court's endorsement of CD35 in 2012, there were other "good reasons" for Texas to believe that Section 2 of the VRA required drawing CD35 as a Hispanic-majority district. It is uncontested that Section 2 required no fewer than seven Latino opportunity districts in South and West Texas. C.J.S. App. 112a & n.85, 126a-127a, 176a. And the State had reason to believe that CD35 would satisfy *Gingles*; mapdrawers and members of the Legislature in 2011 were aware of substantial Hispanic populations in Austin and San Antonio, and were furnished with analyses of racially polarized voting (RPV) showing information about polarization statewide and in each district, including District 35. See C.J.S. Supp. App. 67a-69a, 201a, 366a, 467a-469a, 481a-482a. Indeed, one group of plaintiffs proposed and supported the creation of CD35 as "an appropriate § 2" Latino opportunity district during the 2011 redistricting process. C.J.S. App. 174a; see C.J.S. Supp. App. 158a (describing CD35 as a "[n]ew Hispanic VRA district"); C.J.S. Supp. App. 152a, 316a-317a, 319a-320a.

C. The district court's ruling that CD35 failed "strict scrutiny review" because it was "not narrowly tailored to the State's professed interest in avoiding § 2 liability," C.J.S. App. 113a, 177a, rests on misunderstandings of

Section 2's requirements, the trial record, and the strict-scrutiny standards articulated by this Court.

As explained (pp. 4-5, *supra*), to make a prima facie showing of vote dilution under Section 2, a plaintiff must prove, *inter alia*, that the majority group would vote "sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." *Thornburgh* v. *Gingles*, 478 U.S. 30, 51 (1986) (citation omitted). The district court concluded that that precondition could not be met for CD35 because "[e]vidence from county-level elections" in Travis County "shows substantial Anglo crossover voting," such that "the Anglo majority does not usually defeat the minority-preferred candidate." C.J.S. App. 175a. But only a small share (21%) of the total population of Travis County is included in CD35. *Id.* at 181a. The district court did not address whether voting patterns were racially polarized within the particular portion of Travis County included in CD35, nor did it address whether voting patterns were racially polarized across CD35 as a whole (*i.e.*, including both areas inside and outside Travis County). And the district court cited no precedent in support of its apparent assumption that a State necessarily lacks good reasons to draw a Section 2 district any time that a district includes (or, as here, partially overlaps with) a community in which racial polarization is not apparent. To the contrary, this Court has recently reaffirmed that "the basic unit of analysis for racial gerrymandering claims * * * is the district," and has stated that "[c]oncentrating on particular portions [of the district] in isolation may obscure the significance of relevant districtwide evidence." *Bethune-Hill*, 137 S. Ct. at 799-800.

Applying a "holistic analysis," *Bethune-Hill*, 137 S. Ct. at 800, the record confirms that it would be inappropriate

to deem CD35 an improper Section 2 district solely because of a purported lack of racially polarized voting in Travis County. See D. Ct. Doc. 681-3, at 7 (Feb. 28, 2012). The total population of CD35 is 698,488. *Ibid.* The total Hispanic population of CD35 is 438,819 persons, more than two-thirds of whom reside outside Travis County. *Ibid.* The total Anglo population of CD35 is 175,726 persons, nearly three-quarters of whom reside outside Travis County. *Ibid.* Within CD35, the Anglo population from Travis County is only 45,272 persons. *Ibid.* Thus, even assuming a showing that Anglos in the covered portion of Travis County did not engage in racially polarized voting, that would fail to establish that Anglos districtwide would not vote so as "usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. And it is uncontroverted that racially polarized voting existed throughout the counties making up the majority of CD35. See C.J.S. App. 21a (stating that the existence of racially polarized voting outside Travis County was "essentially undisputed" and "supported by all the expert testimony in the case").

In any event, even if the absence of racially polarized voting in Travis County meant that CD35 was not *required* to be drawn as a Section 2 district, the district court erred in finding that CD35 failed strict scrutiny for that reason. This Court's precedents afford a State "'breathing room' to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed." *Cooper*, 137 S. Ct. at 1464 (citation omitted). Here, because the State had, at a minimum, "good reason to think that all the '*Gingles* preconditions' [were] met," "so too it ha[d] good reason to believe that § 2 require[d] drawing a majority-minority district." *Id.* at 1470.

CONCLUSION

For the foregoing reasons, the Court should reject the bases for the district court's findings of intentional discrimination as to eight unchanged districts (CD27, HD32, HD34, HD54, HD55, HD103, HD104, and HD105), and it should reverse the finding of a racial gerrymander as to the remaining unchanged district (CD35).

Respectfully submitted.

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No. 17-586

IN THE

Supreme Court of the United States

GREG ABBOTT, in his official capacity as Governor of Texas, *et al.*,
Appellants,

v.

SHANNON PEREZ, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

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QUESTIONS PRESENTED

The district court found that two congressional districts ("CDs") created by the Texas Legislature in 2011, and subsequently retained by the Legislature in 2013, are legally infirm: CD35 as an unconstitutional racial gerrymander, and CD27 as an intentional and effective dilution of Latino voting rights under §2 of the Voting Rights Act and the Fourteenth Amendment.

1. Does the Court have jurisdiction under 28 U.S.C. § 1253 to hear the State's appeal prior to entry of injunctive relief?

2. Did the district court commit clear error in carefully considering the substantial factual record of racial predominance in the drawing of CD35, or in concluding no narrowly tailored or compelling justification supported such racial predominance?

3. Did the district court properly find that CD27 violates the Fourteenth Amendment and §2 of the Voting Rights Act by diluting Latino voting rights?

RULE 29.6 STATEMENT

The Mexican American Legislative Caucus, Texas House of Representatives ("MALC") is an official caucus of the Texas House of Representatives. MALC is also incorporated as a nonprofit, nonpartisan 501(c)(6) corporation titled Mexican American Legislative Policy Council. MALC has no parent corporation or publicly held company owning 10 percent or more of the corporation's stock.

The League of United Latin American Citizens ("LULAC") is a 501(c)(3) organization. LULAC has no parent company and issues no stock.

The Texas State Conference of NAACP Branches is a nongovernmental corporation. It has no parent corporations and no stock.

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INTRODUCTION

This appeal is not about a statewide congressional map called Plan C235. Nor is it about a "court-drawn" redistricting plan at all. Rather, this appeal is about two specific congressional districts, both drawn line-by-line and block-by-block by the Texas Legislature in 2011 in the exact configuration they maintain to this day. Whether the plan-wide label slapped onto the congressional map is C185 or C235, these two districts are the same, occupying the same territory and containing the same voters that the 2011 Legislature corralled into them.

In the State's telling, there was a brief, shining moment in 2013 when Texas history reversed course and the Texas Legislature fell all over itself to conform state conduct to a federal court's provisional observations. The district court rightly saw through the 2013 masquerade.

By and large, the days are long past when racially invidious policies are openly declared. Instead they are couched in pretext, and the only way to unmask pretext is to pull back the curtain and see what facts lie behind it. This task—distinguishing appearance from reality—is assigned to district courts, charged with sorting through the purported facts and witness testimony to ferret out unlawful racial classifications and racial discrimination.

The State and its new United States ally are opportunistically inconsistent in their treatment of appearance versus reality. In asking this Court to review this premature appeal, they argue that regardless of the outward appearance of the lower court's

ruling, this Court should look beyond the words and give it a "practical" reading to find it has jurisdiction. Their emphasis on the practical effects of government action, however, falls away in their substantive argument. There they argue that the Court must proceed formalistically and take at face value whatever the State purveys as justification for its redistricting actions. This Court, they contend, must accept the Legislature's ritualistic 2013 ratification of the district court's plainly provisional interim map order as a slate-wiping exercise and not as what the district court saw it to be: an effort to throw up a smokescreen to obscure the motives underlying the 2011 legislative redistricting plan as to two congressional districts left entirely unaltered by the 2013 bill.

The State further insists that this Court accept its formalistic accounting method for creating minority opportunity districts, that, if accepted at face value, gives the technical appearance of compliance with the Voting Rights Act and masks the practical reality—and practical effect—of a legislative attempt to undermine the Act. Much as the Legislature used a demographic "nudge factor" to paint a false picture of the 2011 version of CD23 as a minority opportunity district when it was specifically micro-designed to achieve the opposite result, the State argues that its drawing of CD35 was tailored to comply with its obligations under §2, when the reality, unearthed by the district court, was that CD35 was designed to achieve a double-whammy: eliminate a preexisting crossover district where minority voters' rights were already protected and trade away the voting rights of nearly a quarter million Latinos in Nueces County two hundred miles away by stranding them in a new district where they are submerged in a sea of Anglo bloc voting.

Appellees lay out the facts below in significant detail because, in a case like this where appearance is pitted against reality, the facts are all the more important.

STATEMENT

At the center of this appeal are two Texas congressional districts in the statewide map labeled Plan C235: CDs 27 and 35. The district court found constitutional and statutory violations in the two districts but has not yet determined an appropriate remedy. The State, now joined by the United States, seeks pre-remedy reinstatement of the districts.

CDs 27 and 35 are creatures of the 2011 Legislature. Sections 27 and 35 of Article II of the 2011 congressional redistricting bill establish the two districts and specify their census geography. Act of June 20, 2011, 82nd Leg., 1st C.S., ch. 1, 2011 Tex. Gen. Laws 5091-5180. When the Legislature amended the bill in 2013, it bypassed these two sections altogether, leaving CDs 27 and 35 in the "exact same configuration" since 2011. C.J.S. App. 113a.[1]

A. In *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) ("*LULAC v. Perry*"), the Court invalidated Texas Congressional District 23 as a violation of §2 of the Voting Rights Act, 52 U.S.C. § 10301. On remand, the district court remedied the violation, adjusting the boundaries of five Texas congressional districts. 457 F. Supp. 2d 716 (E.D. Tex. 2006). The court's changes were incorporated into a

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[1] "C.J.S. App." refers to the appendix to the Jurisdictional Statement in Case No. 17-586. "Supp. App." refers to the supplemental appendix (containing the findings of fact) to the Motion to Dismiss or Affirm in Case No. 17-586. "J.A." refers to the Joint Appendix.

statewide map called Plan C100 (the "benchmark" plan). It contained six Latino opportunity districts in the region of the state with the heaviest concentration of Latino voters.[2] This is the large swath of South and West Texas radiating in a fan south- and southwestward from Travis County—but not including it—that is referred to in this litigation as the South and West Texas "envelope." 457 F. Supp. 2d at 720; Supp. App. 428a.[3] The benchmark plan remained in effect through 2010.

Benchmark CD27 ran south along the Texas Gulf Coast, from Nueces County in the north to Cameron County on the Mexican border. It had been in this southern orientation—and had been a Latino opportunity district under §2—since 1982. Supp. App. 287a-88a, 299a. Until 2010, Nueces County Latinos had been electing their congressional candidates of choice for more than a quarter century. *Id.* 294a.

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[2] A minority opportunity district under §2 is one in which minority voters comprise a majority of eligible voters and have a reasonable opportunity to elect candidates of their choice. *See, e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994). As to terminology, this brief uses the term "Latino" instead of the term "Hispanic" often used in the proceedings below, but quotes and shorthand references, such as "HCVAP," derived from "Hispanic" are left in the form used below.

[3] The district court described the South and West Texas envelope as the "large triangular area contained by a line starting in Nueces County, running south to Cameron County, then along the Rio Grande River to El Paso County, then from El Paso County to Bexar County, then northeast to the Hays/Travis County line, and back to Nueces County." Supp. App. 298a. Travis County lies north of the envelope in Central Texas. There is a seventh Latino opportunity district in another part of the state—CD29 in Harris County—that is not at issue in this appeal.

Benchmark CD25 was anchored in Travis County (home to Austin) in Central Texas and ran southeast from there through less populated counties. Most of its population was in Travis County. Supp. App. 301a. It functioned as a "crossover district." *Id.* 340a, 428a; C.J.S. App. 175a-76a; Br. for State Appellants ("Br.") 47 n.12.

The last round of congressional elections conducted under Plan C100 in 2010 was a wave election for Republicans. Supp. App. 25a. One exception was in benchmark CD25, where the Anglo Democratic incumbent was reelected with the support of Latino and African-American voters. *Id.* 301a, 428a. But elsewhere, Democratic incumbents fared poorly, including in districts in South and West Texas where Latino voters who had an opportunity to elect candidates of their choice failed to do so in 2010. In benchmark CD27, an Anglo Republican, Blake Farenthold, won against the Latino candidate of choice, Democratic incumbent Solomon Ortiz, by a less than 1 percent margin. *Id.* 26a, 291a-92a. In benchmark CD23, a Latino opportunity district spread across West Texas from San Antonio to El Paso, the Latino-preferred Democratic incumbent also lost to a Republican challenger. *Id.* 25a.

B. Release of the 2010 decennial census showed that the state's population had increased by 4.2 million over the previous decade. Supp. App. 457a. Its population contained no racial or ethnic majority. Dkt. No. 277 at 22 (Stip. 76). The surge in population yielded Texas four new congressional seats. *Perry v. Perez*, 565 U.S. 388, 390 (2012).

This massive growth in population was disproportionately African-American, Latino, and Asian-American. Ninety percent of the statewide population

growth was attributable to minorities, with Latinos alone accounting for 65 percent of the growth. Supp. App. 16a, 457a. Minorities further accounted for 70 percent of the growth in citizen voting age population ("CVAP"). *Id.* 459a. The Anglo share of CVAP, meanwhile, declined in every benchmark district. *Id.* 460a.

In the South and West Texas envelope, Latinos accounted for almost all of the CVAP growth. Supp. App. 461a. All six of the benchmark plan's Latino opportunity districts in the envelope were overpopulated. *Id.* 430a-31a. Collectively, they were so overpopulated that enough population was left over to compose nearly three-quarters of a new ideal-size district. *Id.*

Travis County also had significant population growth but, in contrast to other major areas of the state, the pace of Anglo growth essentially equaled the pace of Latino growth. Supp. App. 460a-61a.

C. As the 2011 redistricting process began, Republicans held overwhelming majorities in the Texas Legislature and were "hostile to the creation of any minority districts." Supp. App. 38a, 476a. They and their redistricting leaders—Representative Solomons in the House and Senator Seliger in the Senate—equated minority opportunity districts with Democratic districts and therefore opposed creation of any new congressional district that would be dominated by voters of color unless they deemed it required by §2. *Id.* 438a, 476a.[4]

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[4] Solomons and Seliger, along with Solomons' chief mapdrawer Ryan Downtown, were "the primary persons responsible for drawing and making decisions about the congressional map." Supp. App. 431a.

The actual mapdrawing job fell to the House redistricting committee, chaired by Representative Solomons. Supp. App. 152a. Chairman Solomons, unfamiliar with redistricting law and Voting Rights Act requirements, appointed staffer Ryan Downton, also lacking in redistricting experience, the primary mapdrawer. *Id.* 44a, 46a, 152a.

Four foundational principles set the stage for the drawing of the new congressional plan. First, Downton, with Solomons' and Seliger's acquiescence, used an automatic numerical metric for deciding what constituted a minority opportunity district under §2. His "sole criterion" for determining the existence of such a district was whether its population was majority CVAP for a single minority, "even if it never elected the minority's candidate of choice." Supp. App. 437a. Thus, to classify a district as a Latino opportunity district, the Legislature's chief mapdrawer set a quota of 50 percent or more HCVAP, regardless of actual or anticipated election outcomes. *See, e.g., id.* 383a.

Second, the proposal to create a new minority opportunity district in the Dallas-Fort Worth ("DFW") area, Supp. App. 253a, 256a, was rejected as not required by §2. *Id.* 258a-59a, 260a, 286a.

Third, after the decision not to draw a new minority opportunity district in the DFW area, Solomons established a "3-1 rule" for the new districts. Regardless of population growth, only one of the four new seats would be a district favoring Democrats and, perforce, it would be a minority opportunity district. Supp. App. 286a, 435a. "Once Solomons was advised that only one new VRA district was required, Solomons would only consider a map that increased the net number of Republican districts by three." *Id.* 439a; *see also* C.J.S. App. 172a (objective was to create a 3-1 map that

"increased the number of Republican seats by three and Democrat seats by only one"); *id.* 220a n.73 (mapdrawers "adhere[d] to a 3-1 map policy").

Fourth, there was a political imperative to protect two Republican incumbents when drawing districts in the South and West Texas envelope. Those incumbents, Canseco and Farenthold, had won unexpected victories in 2010 in Latino opportunity districts (benchmark CDs 23 and 27, respectively) but neither was the Latino voters' candidate of choice. Supp. App. 25a-26a. The mapdrawers knew that these districts had to be reconfigured to protect the Republican incumbents, Supp. App. 151a, 293a, 342a; C.J.S. App. 143a, 191a-92a, 393a, and that the key to this was to draw in Anglo voters—and draw out Latino voters—in and near the envelope.[5]

D. Downton, the mapdrawer, was assigned the task of incorporating these four basic instructions into a statewide map. Specifically, he was to eschew any new district for minorities in the DFW area, use the bright-line 50 percent metric to measure what constitutes a minority opportunity district, allow a net gain of only

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[5] These problems were highlighted as redistricting strategizing got underway in late 2010 in two memos by Eric Opiela, the Republican congressional delegation's redistricting emissary to the Legislature and a regular confidante of Downton. Supp. App. 442a. The first memo, directed primarily at CD23, suggested the use of a "nudge factor" to protect Canseco by "nudging" high turnout Latino voters out of the district and swapping in low turnout Latino voters, increasing the total HCVAP of benchmark CD23 but lowering the likelihood the Latino-preferred candidate would win. *Id.* 27a-28a, 431a-32a. The second memo, issued a few days later, highlighted the "problems inherent in trying to protect both Farenthold and Canseco" and identified the need to find more "Anglo voters"—a term used four times in the short memo—somewhere in or near the envelope. *Id.* 29a.

one Democratic district (deemed synonymous with a minority opportunity district) in or near the South and West Texas envelope, and protect both Canseco and Farenthold's incumbencies by drawing new districts in which enough Anglos were added so they would win. His solution in drawing CDs 27 and 35—adopted by the 2011 Legislature, signed by the Governor, and left untouched ever since—is the one invalidated by the district court and now before this Court for review.

1. *DFW Area.* As set forth above, the proposal to create a minority opportunity district in the DFW area had been flatly rejected. Implementing this instruction, however, was no easy feat in light of the massive minority population growth in the area, which accounted for adding a new seat there, Supp. App. 286a. Using racial data, the mapdrawers sliced and diced the minority population to "decrease current and future minority voting strength," and district lines "pulled strangely-shaped minority population areas out of certain districts in order to submerge them in larger Anglo populations and to reduce minority voting strength." C.J.S. App. 400a; Supp. App. 286a.

2. *CD23.* In CD23, two of the basic instructions converged. Mapdrawers used the bright-line 50 percent HCVAP metric for what would be deemed a Latino opportunity district and, working within that framework, assiduously traded precincts in and out to implement the "nudge factor" concept to protect Canseco's incumbency. Working closely with others, Downton put the nudge factor to work, painstakingly identifying precincts with high Latino presence and low Latino turnout, and then artfully manipulating district lines to increase HCVAP percentage while excluding high turnout Latino precincts from the district. C.J.S. App.

106a, 145a; Supp. App. 391a.[6] The Legislature then assigned CD23 to the category of "Latino opportunity district," even though it was drawn for the specific purpose of ensuring that the Latino-preferred candidate would not win. C.J.S. App. 146a. In other words, borrowing from the 2003 legislative playbook, the Legislature reconfigured benchmark CD23 "to protect a Republican candidate who was not the Latino candidate of choice from the Latino voting majority in the district." *Id.* 144a; *see also id.* 147a-48a (CD23 reconfigured to "create the facade of a Latino opportunity district"). The district had been "nudged" from one that performed for Latino voters to one that would not.

Even with the putative Latino opportunity district in CD23, the Legislature knew that §2 would require one more Latino opportunity district in the South and West Texas envelope, for a total of seven. Supp. App. 435a; C.J.S. App. 176a, 392a.

3. *CD27 and Nueces County.* Nueces County (home to Corpus Christi) contains 206,000 Latinos, 133,370 of them citizens of voting age, and is overwhelmingly Latino in total population. Supp. App. 294a; JX-100.2. Benchmark CD27, which housed the entirety of Nueces County, was a Latino opportunity district that, as of 2011, was overpopulated by only 43,500 people. Supp. App. 293a. Voting in Nueces County is highly polarized along racial lines. *Id.* 300a; C.J.S. App. 183a, 185a.

The mapdrawers knew that the obvious solution to the §2 problem the State faced in the South and West Texas envelope was to leave Nueces County, or most of it, in the envelope and in its long-time southward

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[6] The district court found Downton's denials of the cohesion and turnout manipulation "not credible." C.J.S. App. 146a n.20.

orientation. Supp. App. 297a. As the district court explained: "Including the population of Nueces County in the envelope makes it easier to draw seven Latino opportunity districts under §2," without extending beyond the envelope into Travis County. *Id.* 300a.

Instead, however, Downton removed Nueces County entirely from the South and West Texas districts and drew it into a district oriented northward, out of the envelope. Supp. App. 293a, 298a-99a; *see* J.A. 450a.[7]

[7] The geographic details, down to street level, of individual districts in Plan C235 are available online at the public Texas Redistricting website maintained by the Texas Legislative Council. *See* District Viewer interactive map: Plan C235, http://www.tlc.state.tx.us/redist/districts/congress.html.

While mapdrawers and legislators understood that they could have protected Farenthold in a northward-oriented district while at the same time retaining most of Nueces County—and nearly all of its Latinos—in an opportunity district oriented southward, Supp. App. 297a, they deliberately chose not do so, *id.* 299a-300a.

The "primary and dominant motive" driving this decision "was to place the incumbent Farenthold, who lived in Nueces County and would likely be ousted by the existing Latino majority, into an Anglo-majority district (and thus to take away the opportunity to elect that Nueces County Latinos had enjoyed)." C.J.S. App. 191a. The method chosen to effectuate this purpose was to strand all Nueces County Latinos—nearly a quarter of a million of them—in a new majority-Anglo CD27 where they have "no opportunity" to elect candidates of their choice. *Id.* 190a; Supp. App. 294a-96a, 433a.

To ensure that the purposeful elimination of benchmark CD27 as a Latino opportunity district would not result in one less such district in the envelope, Downton and the Legislature substituted a new CD34—a Latino opportunity district—running north along the Gulf coast from Cameron County on the Mexican border south of Nueces County. Supp. App. 299a. Having satisfied their objective of protecting Farenthold by drawing Nueces County Latinos out of the envelope, the mapdrawers set to the task of creating the §2-mandated seventh Latino opportunity district.

4. *CD35, Benchmark CD25, and Travis County.* For their new Latino opportunity district, Downton and the Legislature looked to Travis County. To be sure, the Legislature had "no reasonable basis" for concluding that a §2 Latino opportunity district should

be drawn in the county. Supp. App. 340a, 342a. Nor was it necessary to draw any of Travis County into a new Latino opportunity district in order to reach the objective of adding one in the South and West Texas envelope. *Id.* 340a, 440a.[8] But the Legislature did it anyway. It used race as a tool not to comply with §2, but to obtain political advantage by creating the "facade of complying with § 2 while actually minimizing the number of districts in which minorities could elect their candidates of choice despite the massive minority population growth that had occurred throughout the state." C.J.S. App. 178a; *see also id.* 110a (putting Travis County population into CD35 "use[d] race as a tool for partisan goals").

Under the benchmark plan, Travis County already anchored benchmark CD25, the crossover district where, with Anglo crossover support, Latinos and African Americans were able to elect their congressional candidate of choice. Supp. App. 306a. And, in stark contrast to the burgeoning Latino growth in the South and West Texas envelope, which had the most concentrated HCVAP increase in the State, *id.* 461a, Travis County was not an area where Latino growth hugely outpaced other growth. C.J.S. App. 169a.

Even more importantly, Travis County is the only locale in the state with legally insignificant levels of racially polarized voting as a whole. C.J.S. App. 175a. "Anglo voters do not show high levels of cohesion and do not vote as a bloc against the minority-preferred candidates." Supp. App. 340a. In short, Travis County

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[8] Downton "did not think CD35 was necessary for § 5 compliance, and he was not sure if it was required by § 2." C.J.S. App. 178a-79a n.45. He did not have "any evidence . . . to support the inclusion of Travis County in the new § 2 district when he decided to place the district there." *Id.*

is the notable exception to the pattern of racially polarized voting that pervades Texas. C.J.S. App. 21a.

Despite these facts, the mapdrawers deliberately dismantled benchmark CD25 by drawing the state's only new Latino opportunity district, CD35, into Travis County. C.J.S. App. 110a (CD35 placement was to "intentionally destroy" benchmark CD25). The new plan divided Travis County, and its more than one million residents, into five congressional districts, none anchored in the county. Supp. App. 333a.

The mechanism used to draw CD35 so as to destroy CD25, moreover, was race. Downton testified that he purposely selected Anglo Democrats in the county and separated them into different districts. Supp. App. 318a. He turned on the software's block-level racial shading function to search out Latinos in Travis County. *Id.* 337a-38a. Using this capability, he reached into north central Austin with a narrow "squiggle" that had no other purpose than to grab an area that was 90-100

percent Latino. *Id.* 318a; C.J.S. App. 167a. He divided a Catholic university precinct to carve its Latino-dominated dorms into CD35. C.J.S. App. 167a. He disregarded state House district lines, and carved those areas into several congressional pieces, because the House lines did not mesh with his racial line-drawing objective. Supp. App. 320a. Analysis of the Travis County divisions show that race was twice as likely as party vote to predict whether a voting precinct ended up in CD35. *Id.* 337a. "The higher percent Hispanic a VTD, the more likely it was included in CD35, and the higher percent Anglo a VTD, the less likely it was included in CD35." *Id.*[9] Congressional district lines in the county did not align "with any recognizable communities other than race." *Id.* 320a. The net effect of the mapdrawers' race-based configuration of CD35 in Travis County was to *reduce* by 63,000 the number of Travis County Latino voters with the opportunity to elect their candidates of choice. *Id.* 336a.

The southern end of CD35, in south San Antonio, was equally race-based in its design. C.J.S. App. 169a. The district runs south out of Travis County in a 3-mile wide strip along Interstate 35 for fifty miles, then funnels through a narrow neck in northeastern Bexar County because the area contains low concentrations of Latinos. *Id.* 414a; Supp. App. 318a. The district then widens to include a large concentration of Latinos on the south side of San Antonio.

As the district court concluded, CD35 was also the least compact of all of the districts drawn in 2011. Supp. App. 339a. It retained this distinction in Plan

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[9] The expert analysis by Dr. Ansolabehere in his 2014 report is the underpinning for these court findings. *See* J.A. 494a-97a.

C235, where it remained exactly as it has been since drawn in 2011. JX-100.10.

In short, as the district court found, it is "clear" that race predominated in drawing CD35. C.J.S. App. 170a; *see also id.* 166a. This finding "applies to the district as a whole." *Id.* 170a n.36.

E. The 2011 regular legislative session ended without enactment of a congressional plan, but on that same day the Governor called a special session to begin immediately. Supp. App. 154a. The Legislature passed its 2011 congressional redistricting bill 24 days later, labeling it Plan C185, and the Governor signed it in mid-July. *Id.* 228a-29a. Because §5 of the Voting Rights Act was still operative at the time, the State filed suit in federal court in the District of Columbia seeking preclearance of its plan. *Id.* 229a.

Lawsuits challenging the enacted congressional and state House plans under §2 and the Equal Protection Clause also were filed in federal district courts in Texas. Ultimately, nine separate plaintiff groups were joined in one consolidated case before the three-judge district court in San Antonio.[10]

The San Antonio court held initial hearings regarding the congressional and House plans in September 2011. But by late October, the district court in the D.C. preclearance lawsuit had not yet ruled, and it became increasingly clear that the San Antonio court would have to craft interim plans for the upcoming elections. The court was forced to modify parts of the election

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[10] The United States joined the plaintiffs in challenging the 2011 plan but did not challenge the 2013 plan. One of the United States' claims was that CD27 constituted intentional vote dilution in violation of §2 and the Constitution. U.S. Post-Trial Br., Dkt. No. 1279 at 26-28 (Oct. 30, 2014).

schedule but held onto the scheduled March primary date. In late November 2011, it ordered an interim plan for congressional elections, Dkt. No. 544, but the State appealed to this Court and, two weeks later, obtained a stay of the plan's implementation. Soon after, the district court again adjusted election deadlines and moved the primary election to early April. Dkt. No. 563 at 7.

On January 20, 2012, in *Perry v. Perez*, this Court vacated the district court's interim plan order and remanded the case for the district court to develop an interim plan under the new standards it had announced. The district court promptly vacated its order for an early April primary and gave the parties only fourteen days to submit "agreed-upon interim maps." Dkt. No. 583.

A subset of plaintiffs negotiated a compromise with the State on an interim map and presented it to the court. C.J.S. App. 6a.[11] The compromise plan's principal changes were centered on the DFW area and CD23. It included no changes whatsoever to CDs 27 and 35.

The State admitted the compromise plan was "far from perfect," but still supported it as "adequate for [its] intended purpose," which was to allow the already-delayed 2012 primary elections to finally proceed. Dkt. No. 605 at 4. According to the State, "in the

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[11] In addition to the State, the main proponents of the compromise plan were the Task Force plaintiff group and Congressman Cuellar. Defendants' Advisory Regarding Interim Redistricting Plans, Dkt. No. 605 at 3 (Feb. 6, 2012).

short term" Texas voters would be better served. *Id.* at 20.[12]

Barely a month after *Perry*'s remand, in the midst of numerous election delays, and over objections from most plaintiffs, the court "accept[ed] the compromise plan." C.J.S. App. 368a. After modifying it for purely technical reasons, the court issued Plan C235 as the interim plan for the 2012 elections. CDs 27 and 35 remained exactly the same as the State drew them in 2011. *Id.* 113a.

The court expressly warned the parties that the "compromise plan" was by no means a "final ruling on the merits of any claims," and reflects only "preliminary determinations" that "may be revised upon full analysis." C.J.S. App. 367a-68a. In allowing CD35 to remain unchanged "at this time," *id.* 415a, the court reiterated that whether it was a racial gerrymander was a "close call," *id.* 409a. The court was equally wary of its preliminary ruling on CD27, noting that the §2 challenges were "not without merit" and that its ruling allowing CD27's interim use was only effective "at this time." *Id.* 419a. In short, Texas was fully on notice that the "preliminary" conclusions about Plan C235 were not the court's final word on the constitutional and §2

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[12] The State reiterated this view of the interim plan to this Court. After one plaintiff group petitioned for a stay of the interim plan order, the State successfully opposed the stay primarily on the ground of short-term necessity. *LULAC v. Texas*, No. 12A234. "The interim maps were *designed to provide an interim solution* for the upcoming elections. . . and need to be used for the purpose for which they were designed." Opposition to Application for Emergency Stay 3 (Sept. 12, 2012) (emphasis added). According to the State, "[t]he whole point of drawing interim maps was to . . . have certainty about the shape of their districts for the upcoming election process." *Id.* at 10.

claims, particularly with respect to CDs 27 and 35. *Id.* 6a (quoting 2012 interim order).

Several months later, in late August 2012, the D.C. court denied preclearance, unanimously concluding that Plan C185, including CDs 27 and 35, "was enacted with a discriminatory purpose." *Texas v. United States*, 887 F. Supp.2d 133, 159 (D.D.C. 2012), *vacated on other grounds*, 570 U.S. 928 (2013). Pointedly, the court explained that "[t]he parties have provided more evidence of discriminatory intent than we have space, or need, to address here," *id.* at 161 n.32, and that it was "persuaded by the totality of the evidence that the plan was enacted with discriminatory intent," *id.* at 161. The court further determined that Texas had violated §5 by dismantling the Travis County-anchored benchmark CD25, which was home to a "tri-ethnic crossover coalition" where minority voters had had an opportunity to elect their congressional candidate of choice. *Id.* at 184, 190. Texas appealed.

F. In 2013, while the preclearance appeal was pending with this Court, the Governor called a special legislative session—on one day's notice—for the express purpose of repealing Plan C185 and adopting Plan C235. Supp. App. 231a; C.J.S. App. 40a. This was only two years after Plan C185's enactment; legislative leadership was the same and so were 75 percent of the legislators. C.J.S. App. 38a n.37; Dkt. No. 1442, Stips. 1-4 (June 28, 2017). The Legislature effectively amended Plan C185 by adopting the changes made in Plan C235. Half of Plan C185's districts, including CDs 27 and 35, were left in place.[13]

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[13] The census block assignments in ten districts, including CD35, are the same in Plans C185 and C235. Another eight

The district court found that "[t]he Legislature did not adopt the Court's plans with the intent to adopt legally compliant plans free from discriminatory taint, but as part of a litigation strategy." C.J.S. App. 40a.[14] That litigation strategy was to evade the same findings of discriminatory intent in the San Antonio court that had already been made by the D.C. court, and to claim protection from the district court's preliminary approval of the interim plan to insulate the State from further liability. By adopting the interim plan, "however flawed," the State sought to "prevent Plaintiffs from obtaining relief for purposeful racial discrimination." *Id.* 44a.

The district court's express warnings about the limitations of its 2012 interim plan did not go unnoticed by the Legislature's own attorney. *See* J.A. 437a-48a. In public testimony, he meticulously walked the legislators through the court's caveats and their implications for the legislative action under consideration. The Legislature, he explained, could not rely on the district court's 2012 interim plan order as proof the plan complied with the Voting Rights Act or Constitution. The district court, he said, had been "in a little bit [of a] tricky [position] because [it] had not made full determinations, . . . had not made fact findings on every issue, had not thoroughly analyzed all the evidence but they had to make some best-case guesses." C.J.S. App. 43a (citation omitted).

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districts, including CD27, are assigned the same populated census blocks in both plans. Dkt. No. 1442, Stips. 7-8.

[14] This unanimous finding was based in part upon documents previously withheld by the State but ordered released in the middle of trial, and upon the district court's assessment of the trial testimony of Rep. Drew Darby—a redistricting committee chairman for the 2013 special session. C.J.S. App. 44a-45a n.45.

"[W]illfully ignor[ing] those who pointed out deficiencies," C.J.S. App. 45a n.45, including its own attorney, on June 24, 2013, the Legislature ratified Plan C235, including the 2011 versions of CDs 27 and 35.

G. The district court subsequently conducted two week-long trials, first on Plan C185 in 2014, then on Plan C235 in 2017. In both, the issues as to CDs 27 and 35 remained the same, because the "exact same configuration of CD35 and CD27 remains in Plan C235" as in Plan C185. C.J.S. App. 113a. The district court's March 2017 ruling on Plan C185 established that intentional discrimination infected the 2011 redistricting plan, describing the intentional fracturing of communities of color and race-based line drawing across the state. *See, e.g.*, *id.* 289a (in the DFW area "race was used as a proxy for political affiliation . . . intentionally to dilute minority voting strength"); *id.* 148a-49a (mapdrawers' "intentional[] targeting [of] Hispanic voter turnout and cohesion" in CD23 "bears the mark of intentional discrimination").

The court's August 2017 ruling on Plan C235 effectively upheld the interim map's compromise changes to CD23 and the DFW-area districts. But the court found differently for CDs 27 and 35. It sustained the challenges leveled against these districts since the case's beginning in 2011. It explained that the Legislature could have complied with its §2 obligation to draw seven Latino opportunity districts in the South and West Texas envelope without extending into Travis County by retaining Nueces County in the envelope districts. Supp. App. 300a. In finding that the legislature's "offset" Latino opportunity district, CD35, was an unconstitutional racial gerrymander, the court found that CD35's location "was not to address § 2 concerns, but to intentionally destroy an existing

district [benchmark CD25] with significant minority population." C.J.S. App. 110a.[15]

The court struck down CD35 as a racial gerrymander in both plans. *See* C.J.S. App. 115a ("Although Plan C235 was enacted in 2013, the decision as to which voters to include within CD35 was made in 2011, and that remains the proper time for evaluating the district[.]"). The court found that the core African-American community in Austin was divided from historical communities of interest and "effectively neutered" by grouping it with a distant metropolitan area with which it did not share interests. Supp. App. 335a. It concluded that "race subordinated other redistricting principles" in Travis County, *id.* 339a, 342a, where minority populations were "fractured" and Latino voters carved out for inclusion in a new majority-minority district without any Voting Rights Act justification because Anglo bloc voting in opposition to minority voter preferences is absent, *id.* 334a, 340a.

As to CD27, the court found that it had been converted from a Latino opportunity district into one where "Latino voters have no opportunity to elect their preferred candidates." C.J.S. App. 190a. The effect was to dilute the voting strength of the more than 200,000 Nueces County Latinos stranded in the district. *Id.* 191a. And the choice was purposeful, made "to protect an incumbent who was not the candidate of choice of

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[15] The court incorporated the findings of fact and opinion that issued with its Plan C185 ruling a few months earlier into the Plan C235 ruling, and the original dissenting panel member agreed that the opinion and those findings constitute the law of the case. C.J.S. App. 14a n.13. The district court was unanimous in its new factual findings regarding the purpose of the 2013 Legislature's litigation strategy.

those Latino voters." *Id.* 190a. After the Plan C235 trial, the court found that this discriminatory intent "carr[ied] over" to the 2013 adoption of identical district lines, "purposefully . . . depriv[ing] plaintiffs of any remedy." *Id.* 46a, 116a.

H. The district court explained at the end of its Plan C235 ruling that its previous bifurcation of the case into separate liability and remedial phases meant that its ruling was only addressing the legal violations in C235. C.J.S. App. 119a. It gave the Legislature an opportunity to remedy those violations found in the ruling. This was hardly the first time it had issued such an invitation. Four months earlier, after it had issued its Plan C185 ruling, the court indicated that the State should be prepared to discuss whether the Legislature—then sitting in regular session—"intends to take up redistricting . . . to remedy any [C185 violations] that persist in the 2013 plans" at an upcoming hearing. Dkt. No. 1352. This request was met with legislative silence. The court again invited the Legislature to act following this Court's decision in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), *see* Dkt. No. 1395, but the Legislature again declined.

At a scheduling hearing for the C235 trial, the State's attorney told the court that October 1, 2017, was a fixed date for any remedial plan to be in place. Hr'g Tr. 66 (Apr. 2, 2017). Thus, when it issued the C235 ruling, the court knew that the state-declared deadline was only a month and a half away. Even though the State had turned a deaf ear to its earlier inquiries about a legislative remedy, the court once again invited a legislative solution, asking the State to advise within three business days—by August 18—whether a special session would be called to consider remedying the violations. C.J.S. App. 118a. Absent

such notification, the court indicated that it intended to hold a remedy hearing on September 5. *Id.*

Upon the State's petition, this Court stayed further proceedings.

SUMMARY OF ARGUMENT

Texas appeals from an order that found two legal violations in a redistricting map. The order enjoined nothing. Nor did it provide a remedy for the violations it found. Whether and when to issue an injunction and what remedy was needed for the two legal violations were deferred so the court could hold hearings where those matters could be addressed. This Court lacks jurisdiction over an appeal of this sort.

If the Court decides that it has jurisdiction, then it will be reviewing the constitutional and statutory validity of two specific districts, CDs 27 and 35, in a statewide congressional map labeled Plan C235. Both districts were in the same place with the same people in the earlier statewide map labeled Plan C185.

The Court's review of the two districts' validity is under the clearly erroneous standard set out in Rule 52(a) of the Federal Rules of Civil Procedure. The State cannot escape review under that standard by the ploy of using a perfunctory 2013 legislative "ratification" of an interim court map that did not even touch the two districts at issue on appeal. The State and the United States try to change the Court's focus by claiming that the plan is "court-drawn" and, hence, the State is owed judicial deference in having adopted it. But only half of the districts in the court's one-time-only plan were "court-drawn." The other half, including the two districts at issue here, were "legislatively-drawn" by the 2011 Texas Legislature. The 2013 gambit is nothing but a ruse.

The district court painstakingly reviewed the facts about the Legislature's formation of these districts, the reasons for their configuration, and the effects of their creation on minority voters. And what its exhaustive review of the evidence showed is that Texas's motivation for its design of CD35, and its choice of who was in and who was out of it, was overwhelmingly racial. Further, the State had no cognizable compelling interest in creating CD35. Travis County, the locus of the State's principal fine-tuning of the district, is the one major area of the State where racially polarized voting is legally insignificant. While the requirements of §2 of the Voting Rights Act may be the *raison d'etre* for a race-based district, those requirements are simply absent here. Indeed, far from having "good reasons" to believe that §2 compelled the race-based configuration of CD35 into Travis County, *Ala. Leg. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015), the Legislature was motivated by the undisputedly *bad* reason of "destroy[ing] [an] otherwise effective crossover district[]" where minorities already were electing their candidates of choice with the help of crossover Anglo voters, *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009).

Section 2 further provides no refuge for the configuration of CD35 where the Legislature knew it had readily at hand an alternative place to draw a Latino opportunity district where §2 requirements were easily met. Unlike in Travis County, Nueces County is home to extensive racially polarized voting, and a southward running Latino opportunity district anchored in Nueces County would have satisfied the State's §2 obligation. But the State not only refused to take that ready route, it affirmatively worked to undo the rights of Latinos in that part of the state. And it succeeded in its objective. For no reason other than to advance the

election prospects of an Anglo incumbent, it drew a new district which by its very design would drown out the votes of the Latino voters who had §2 rights. In short, the State cynically eliminated the §2 rights of Latino voters in one part of the State and ostensibly assigned those rights to voters in another part of the State where §2 required no remedy. The intentional vote dilution of Nueces County Latinos in CD27 had its desired effect and therefore violates §2 from any angle.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THIS APPEAL

This Court has no jurisdiction to entertain Texas's premature appeal because the district court has not ordered injunctive relief. Under 28 U.S.C. § 1253, appeals to this Court from three-judge district courts may only occur "from an order granting or denying . . . an interlocutory or permanent injunction." There has been no such injunction here, as made clear in both the order on appeal, *see* C.J.S. App. 119a, and the court's subsequent order denying Texas's motion for stay pending appeal, *see* Dkt. No. 1538 (Aug. 18, 2017) ("Although the Court found violations in Plan C235, *the Court has not enjoined its use for any upcoming elections*.") (emphasis added). Under the plain text of § 1253, this Court lacks jurisdiction.

The "practical effects" test used in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), to determine whether there had been the denial of an injunction for purposes of appealability under 28 U.S.C. § 1292 is inapposite here for at least three reasons. First, the State's argument not only finds no basis in the plain text of § 1253, it directly contradicts the plain

text of § 1292, which expressly excludes from its ambit instances "where a direct review may be had in the Supreme Court." Second, *grants* of injunctive relief and *denials* of injunctive relief are measured by different standards, the former requiring far more detail and precision. *See Gunn v. Univ. Comm. to End the War in Viet Nam*, 399 U.S. 383, 388 (1970) (citing Fed. R. Civ. P. 65(d)). Third, even if the two provisions were construed the same way, the liability ruling in the court below did not grant injunctive relief in any "practical" sense where the "practical effect" of what a remedy would entail, who it would affect, and when it would be implemented remain, to this day, unknown and unknowable.

To avoid repetition, the Appellees on this brief adopt by reference the arguments made in opposition to jurisdiction in Part I of the Appellees' brief on state legislative districts, *Abbott v. Perez*, Case No. 17-626.

II. THE 2013 LEGISLATIVE INACTION WITH RESPECT TO CDS 27 AND 35 DOES NOT SUPPLANT THE 2011 LEGISLATIVE RECORD FROM WHICH THOSE DISTRICTS DERIVED

The State's central argument is that "any threat of injury from the 2011 redistricting plans disappeared when the Legislature repealed them." Br. 44. With respect to CDs 27 and 35, this is transparently false. Where these two districts were first placed by the Legislature when it enacted them in 2011, and where they have remained untouched ever since, voters in those districts have continued to suffer from the unlawful intent that drove their configuration and the discriminatory effects that have persisted in every congressional election this decade.

A. In 2013, the Legislature did precisely nothing with respect to CDs 27 and 35. Instead, each and every census block that was pieced together to form CDs 27 and 35 in 2011 was left untouched. Each and every voter who was drawn into those districts in 2011 remained in those districts in 2013. In fact, the only official place to find a geographical definition of these districts is in the intricacies of the 2011 legislation. Act of June 20, 2011, 82nd Leg., 1st C.S., ch. 1, 2011 Tex. Gen. Laws 5091-5180.[16] The 2013 redistricting bill does not amend these districts in any fashion. Contrary to Appellants' contention, legislative inaction does not magically erase prior legislative intent. If anything, a legislature's ratification of previous actions is nothing more than adoption of them, along with their underlying intentions. CDs 27 and 35 did not undergo a rebirth in 2013, only a continuation.

As a practical matter, judicial sanction of the State's purported "make-over" here would invite legislatures to manufacture new legislative records for blatantly discriminatory laws. Under the State's logic, for instance, where a challenge to legislatively enacted districts culminates in a trial riddled with damning evidence of discriminatory intent, a legislature could simply erase the record by reconvening before a judicial ruling is entered and reenacting the same districts, this time citing a purported effort to "cleanse" the districts of their discriminatory origins, or even to "bring [the] existing litigation to an end," Br. 36. *See* C.J.S. App. 115a (under State's theory, "a Legislature could always insulate itself from a *Shaw*-type challenge simply by re-enacting its plan

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[16] As explained above, *supra* n.13, Plan C235 made an inconsequential change to CD27 by removing a few unpopulated census blocks.

and claiming that it made no decisions about who to include in the district at the time of re-enactment"). There can be little doubt that, in such circumstances, the Legislature would and should be unable to supplant the original legislative record with a newly manufactured record that results in purposeful reinstatement of the status quo.

As a legal matter, the fact that Plan C235 nominally repealed Plan C185 rather than amended it does not provide legislative cover for those districts that remained the same. In *Oneida County v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985), this Court held that a repeal in name only has no impact on the substantive provisions that remain the same.

> Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the [old] act . . . when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is . . . entirely correct to say that the new act should be construed as a continuation of the old[.]

Id. at 246 n.18 (quoting *Bear Lake & River Waterworks & Irrigation Co. v. Garland*, 164 U.S. 1, 11-12 (1896)); *see also Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 505 (1936). Technical canons of statutory construction only reinforce application of this principle to the statutory provisions at issue here. "[W]hen an existing statute is reenacted by a later statute in substantially the same terms, . . . [t]he unchanged provisions which are repeated in the new enactment are construed to have been continuously in force." 1A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* ("*Sutherland on Statutory*

Construction") § 23:29 at 542-43 (7th ed. 2009). The nominal repeal of Plan C185 in 2013 is thus of no moment with respect to the legal analysis of those districts that have remained in effect since 2011.

In this situation, the district court properly relied on *Hunter v. Underwood*, 471 U.S. 222 (1985), to conclude that the portions of the 2011 plan the court found had been drawn with an impermissible motive "remain unlawful" if "those lines remain unchanged" in Plan C235 because the "discrimination continues to have its intended effect." C.J.S. App. 35a. Appellants' attempt to distinguish *Hunter*, *see* Br. 32; U.S. Br. 33, rests on the same flawed premise that the Legislature actually took action on CDs 27 and 35 in 2013—which it did not. *Hunter* was unequivocal on the constitutional rule that governs analysis of CDs 27 and 35 here: If the "original enactment was motivated by" invidious discriminatory intent "and the section continues to this day to have that effect," it violates equal protection under the test laid down in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *Hunter*, 471 U.S. at 233.

This case is indistinguishable. At the beginning of the decade, Texas enacted a redistricting plan riddled with discriminatory intent. While judicial intervention mitigated some of the discriminatory effect flowing from that improper intent, acquiescing to that limited and preliminary judicial intervention by enacting Plan C235's changes to the DFW districts and CD23 does not erase the intent with which CDs 27 and 35 were enacted or do anything to ameliorate how that intent

continued to produce the same effect in those districts in 2013 and beyond.[17]

The State's insistence that any analysis of the districts as drawn in 2011 is moot thus strains credulity in light of the fact that CDs 27 and 35 have been "continuously in force" since 2011. *Sutherland on Statutory Construction* § 23:29 at 542-43. A challenged statute does not become moot just because it is voluntarily repealed (and reenacted, unchanged) in the middle of a lawsuit. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 n.10 (1982). Here, the Legislature not only left open the possibility that it *might* reenact the 2011 redistricting statute, it effectively *did* reenact—or more precisely, "ratify"—that statute with respect to the only districts at issue in this appeal. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993) ("There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so."); *id.* at 662 n.3 (controversy is not mooted where a new statute is "sufficiently similar to the repealed [statute] that it is permissible to say that the challenged conduct continues").

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[17] Indeed, the State's contention that the reenactment of the identical configurations of CDs 27 and 35 in 2013 saved the districts from invalidity under the Constitution and Voting Rights Act is refuted by this Court's interpretation of the Voting Rights Act itself. In *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997), this Court was faced with an argument that the 1982 renewal of §5 changed a prior interpretation of the Act's reach. The Court rejected the argument on the ground that *not* amending the statute does not constitute a change in the way the statute should be interpreted. "Quite obviously, reenacting precisely the same language would be a strange way to make a change." *Id.* at 484 (quoting *Pierce v. Underwood*, 487 U.S. 552, 567 (1988)).

B. Nor can the State seek refuge in the district court's purported "blessing" of CDs 27 and 35 in its 2012 interim plan order. The State's defense is unprecedented, boiling down to this putative rule: a legislature that successfully masks its discriminatory motives during preliminary injunction proceedings can permanently erase a discriminatory legislative record by simply repealing and reenacting its law—shifting the responsibility for its creation from the legislature to the court.

Ample authority shows the opposite to be true. The Court only recently explained the characteristics of preliminary rulings in terms contradicting Texas's argument:

> Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents. The purpose of such interim equitable relief is *not to conclusively determine the rights of the parties*, but to balance the equities as the litigation moves forward.

Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (emphasis added) (citations omitted). This echoes decades of precedent establishing that a preliminary injunction ruling has limited significance for the ultimate disposition of a claim.

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis

> of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.

Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (citations omitted); *see also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 317 (1985) ("any conclusions reached at the preliminary injunction stage are subject to revision"). The State's gambit of claiming safe harbor in the district court's preliminary ruling "improperly equates 'likelihood of success' with 'success,' and . . . more important . . . ignores the significant procedural differences between preliminary and permanent injunctions." *Camenisch*, 451 U.S. at 394.

The State can hardly feign surprise that preliminary court rulings cannot be used to justify the reenactment of identical districts. Not only did the Legislature's own lawyer caution against this shell-game strategy for hiding the State's unconstitutional conduct in 2013, but also the district court expressly told Texas that its interim ruling was "not a final ruling on the merits of any claims asserted by the Plaintiffs in this case." C.J.S. App. 367a. The State had no basis to believe the §2 and constitutional issues had been fully addressed or finally resolved where the district court had cited a variety of "difficult and unsettled legal issues as well as numerous factual disputes" that were made all the more "difficult to determine" in light of the "necessarily expedited and

curtailed" time frame for analysis. *Id.* 367a-368a.[18] The district court's repeated caveats, moreover, that the interim plan was acceptable *only to the extent it was interim* provided the Legislature no excuse for avoiding a considered analysis of its own and cementing CDs 27 and 35 for the remainder of the decade.[19]

In short, the State's boast that it simply "took the court at its word," Br. 2, is an empty one. The district court's "word" to Texas was that the interim plan ruling contained only "preliminary determinations" for one election cycle that "may be revised upon full analysis." C.J.S. App. 367a-68a. The State paid no heed.

This Court should not sanction the State's gaming of the judicial process. The Legislature's inaction in 2013 with respect to CDs 27 and 35 left those district lines, and the circumstances of their origin, in full force and effect. Accordingly, the district court properly grounded its analysis of the districts in the 2011 redistricting process.[20]

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[18] Indeed, the only federal court that *had* carefully considered the legality of the original plan found rampant discriminatory intent planwide. *Texas v. United States*, 887 F. Supp. 2d at 159, 161 & n.32.

[19] *See, e.g.*, C.J.S. App. 417a ("*For purposes of an interim plan*, the Court concludes that C235 adequately addresses the claims relating to the Central Texas districts.") (emphasis added); *id.* 423a (deeming Plan C235 "an appropriate interim plan"); *id.* 368a ("accept[ing] the compromise plan" because it "would significantly benefit the voters, candidates, election administrators, counties, and political parties" for the 2012 elections).

[20] Even were the Court to determine that the proper focus of the questions of motive, intent, and purpose is the action of the 2013 Legislature instead of the 2011 Legislature, the district court unanimously found that the 2013 Legislature displayed the

III. CD35 HAS BEEN A RACIAL GERRYMANDER EVER SINCE IT WAS DRAWN IN 2011

The district court struck down CD35 as a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. In accordance with this Court's precedent, it found that race predominated over traditional districting principles in "the drawing of district lines and selection of district population" in CD35, C.J.S. App. 166a, which maintained the "exact same configuration" in Plans C185 and C235, *id.* 113a. The court further concluded that the Legislature's race-based redistricting of CD35 was not tailored to a compelling state interest; mapdrawers set out "not to substantially address the § 2 requirement, but to use race as a tool for partisan goals." *Id.* 110a. The district court's assessment of CD35 in accordance with the "two-step" racial gerrymandering inquiry "warrants significant deference on appeal to this Court." *Cooper*, 137 S. Ct. at 1464.[21]

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invidious intent and dominant motive necessary to invalidate CDs 27 and 35. Its findings are not clearly erroneous and should not be overturned by the Court. The Appellees on this brief adopt by reference the arguments made on this point in Part II.B of the Appellees' brief on state legislative districts, *Abbott v. Perez*, Case No. 17-626.

[21] The district court's racial gerrymandering finding did not hinge on the State's discriminatory intent. The district court correctly noted that "[d]iscriminatory purpose is not an element of a *Shaw*-type claim." C.J.S. App. 37a n.36 (referring to *Shaw v. Reno*, 509 U.S. 630 (1993)); *see also id.* 164a n.31 ("The harm flows from being 'personally . . . subjected to [a] racial classification,' not from vote dilution or intentional discrimination.") (quoting *Alabama*, 135 S. Ct. at 1265); *Covington v. North Carolina*, 316 F.R.D. 117, 124 n.1 (M.D.N.C. 2016) ("In reaching this conclusion [that race predominated], we make no finding

Texas does not even attempt an argument that race did not predominate in the actual line drawing of CD35 or that the district court's extensive factual findings on this score are clear error. For good reason: the evidence of racial predominance in the selection of population within and without CD35 is overwhelming.

The district court found that nearly every traditional districting principle in CD35 was subordinated to race. In Travis County, the lines were drawn in complete disregard of city boundaries, state House district boundaries, and "any other recognizable communities of interest other than race." C.J.S. App. 168a; Supp. App. 320. Race subordinated party vote—by a factor of two—in the shuffling of voting tabulation districts in the five new congressional districts tattooed onto Travis County. Supp. App. 337a. Precincts were split to lasso the heavily-Latino dorms of a local Catholic university into CD35, apart from the rest of the school, and to send an "arrowhead" extension into northern parts of Austin to bring Latino apartment renters into a district running along the interstate then looping into the south side of San Antonio eighty miles away. C.J.S. App. 167a; *see Bush v. Vera*, 517

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that the General Assembly acted in bad faith or with discriminatory intent in drawing the challenged districts[.]"), *aff'd*, 137 S. Ct. 2211 (2017). That analysis comports with this Court's articulation of the racial predominance standard as one which examines the use of race in the placement of voters in various districts. *Alabama*, 135 S. Ct. at 1271 ("[T]he 'predominance' question concerns which voters the legislature decides to choose, and specifically whether the legislature predominantly uses race as opposed to other, 'traditional' factors when doing so."); *see also Miller v. Johnson*, 515 U.S. 900, 916 (1995). It is the race-based placement of voters without a strong basis in evidence for doing so, rather than any intent to discriminate through vote dilution, that defines a *Shaw* claim.

U.S. 952, 970-71 (1996) ("split[] voter tabulation districts" provide "objective evidence" of racial predominance since "the districting software used by the State provided only racial data at the block-by-block level").

Nor were these deviations from traditional districting criteria limited to the north half of CD35. *See* C.J.S. App. 170a n.36 (district court's "finding that race predominated in the drawing of [CD35] applies to the district as a whole"). Race was similarly the basis for selecting voters in Bexar County, where, after snaking south along the interstate, CD35 first narrows in low-density Latino areas then widens to embrace the large Latino community in South San Antonio. *Id.* 169a. Along the way, county and small city boundaries gave way to race. Supp. App. 328a-29a; C.J.S. App. 170a. The end result of this race-based carving of voters from north central Austin to the south side of San Antonio is a district that remains the least compact congressional district in the state. Supp. App. 339a; *see also* C.J.S. App. 162a-63a.

Where, as here, race predominates, the burden shifts to the State to demonstrate that the district's configuration was narrowly tailored to a compelling government interest. *Cooper*, 137 S. Ct. at 1464. Based on all available evidence, the district court rightly concluded that Texas had not satisfied its strict scrutiny burden with respect to CD35. While Texas leaned on §2 of the Voting Rights Act to justify its race-based redistricting of CD35, the district court found not only that CD35 was not "actually . . . necessary" to avoid a §2 violation, *Alabama*, 135 S. Ct. at 1274, but also that the Legislature had "no reasonable basis" for believing it was, Supp. App. 340a.

The district court found—and Texas does not dispute—that "the third *Gingles* precondition is not present in a significant portion of the district," namely Travis County. C.J.S. App. 175a. *See Thornburg v. Gingles*, 478 U.S. 30, 51 (1986) (requiring as precondition for §2 liability that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate"). Unlike most other areas of Texas, "Travis County does not have Anglo bloc voting." C.J.S. App. 110a. Rather, Travis County Anglos lack cohesion and split their vote, Supp. App. 308a, and therefore "do not vote as a bloc against the minority-preferred candidates." *Id.* 340a. African-American and Latino voters in Travis County "have the ability to elect their preferred candidates precisely because Anglo voters vote at sufficiently high rates for minority-preferred candidates." *Id.* Without evidence that racial bloc voting compelled the extension of CD35 into Travis County, Texas's §2 justification falls flat.[22]

The district court further found that "mapdrawers *knew*" that the third *Gingles* precondition was not satisfied in Travis County. C.J.S. App. 110a (emphasis added). To be sure, "[t]here is no indication that [the mapdrawer] had any evidence, much less a strong basis in evidence, to support the inclusion of Travis County in the new §2 district when he decided to place

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[22] While the district court was "inclined to find that CD35 is not compact for §2 purposes," it deferred the issue since the third *Gingles* precondition was found lacking. C.J.S. App. 175a. Indeed, the mapdrawer himself believed that CD35 was "borderline" on the compactness scale and "had his doubts that the district was required by § 2," C.J.S. App. 162a, and the State's own experts testified that CD35 is "definitely not a compact district" and "not 'compelling from a Section 2 standpoint,'" *id.* 162a-63a & n.30.

a district there." *Id.* 179a n.46. Nor was there any evidence "that any member of the Legislature, including Chairmen Solomons and Seliger, had any basis in evidence for believing that CD35 was required by § 2 other than its HCVAP-majority status." *Id.*; *see also id.* (mapdrawer "repeatedly testified that his sole criteria for a § 2 district was whether it was above 50% HCVAP"); *id.* 178a ("There is no indication that mapdrawers or the Legislature drew CD35 in Travis County because they felt that Hispanic voters there had a § 2 right that needed a remedy."). The State cannot now seek refuge in §2 where its configuration of CD35 was not even informed by, let alone grounded in, an inquiry into §2 requirements. *See Shaw v. Hunt* ("*Shaw II*"), 517 U.S. 899, 908 n.4 (1996) ("To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification, and the legislature must have had a strong basis in evidence to support that justification before it implements the classification.") (citation omitted). The State's willful failure to examine even minimally the critical issue of racial bloc voting for purposes of assessing potential §2 liability falls far short of its strict scrutiny burden to establish narrow tailoring. *See Cooper*, 137 S. Ct. at 1472 (refusing to "approve a racial gerrymander whose necessity is supported by no evidence").

In fact, the district court found as a fact that the "actual purpose" of Texas's race-based drawing of CD35 was never based on a legislative belief that §2 required its configuration, but, rather, on the race-based carve-up of Travis County and dismantlem[illegible]t of the existing crossover district there.

> [T]hey drew CD35 as an HCVAP-majority district that extended into Travis County for

> the purpose of eliminating the existing district [CD25] in which minorities and Anglos together elected a Democratic candidate (and to unseat that candidate). In this way, they were able to create the facade of complying with § 2 while actually minimizing the number of districts in which minorities could elect their candidates of choice despite the massive minority population growth that had occurred throughout the state.

C.J.S. App. 178a; *see also id.* 110a. This finding is fully supported by the record. *See Cooper*, 137 S.Ct. at 1465 (district court's findings of fact "are subject to review only for clear error"). The Legislature decided in advance that any new minority opportunity district in Texas had to yield a net gain of three Republican seats. Supp. App. 439a. "Although [the mapdrawer] could have drawn a new central Texas Latino opportunity district without including Travis County or disrupting CD25, he chose this configuration to ensure a 3-1 map." C.J.S. App. 440a. Thus, the district court concluded, "[a]lthough a new Latino opportunity district was required in South and West Texas, . . . mapdrawers' placement of significant population from Travis County into CD35 was not to substantially address the §2 requirement, but to use race as a tool for partisan goals." *Id.* 110a.[23]

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[23] To be sure, the State has no compelling interest in achieving *racially invidious* objectives by purposely destroying a crossover district. Shortly before this decade's redistricting cycle, this Court admonished states against such constitutionally suspect conduct. *See Bartlett*, 556 U.S. at 24 (a showing that a state "intentionally drew district lines in order to destroy otherwise effective crossover districts" would "raise serious questions" under the Fourteenth Amendment). The district court discussed the constitutional problem with the deliberate destruction of the Travis County-based crossover district but refrained from directly ruling

The State's principal argument in defense of CD35's race-based configuration is that the district court's interim map did not alter it. Br. 45-46. But as set forth above, *supra* Part II, Texas's decision to maintain the status quo in CD35 by doing nothing at all in 2013 cannot replace the actual decisions made when the actual lines were drawn by the Legislature in 2011. *See also* C.J.S. App. 115a. The district court's 2012 preliminary inquiry, moreover, can hardly be the justification for the State's action where that inquiry shifted the strict scrutiny burden to Appellees. The court asked whether *Appellees* had "demonstrated a substantial likelihood that CD35 would fail a strict scrutiny analysis if strict scrutiny applies," *id.* 415a, not whether the State would meet its burden to satisfy strict scrutiny. Texas's glib contention that "[i]f the district court had 'good reasons' to believe that CD35 needed to be drawn as a minority-opportunity district to address potential VRA §2 claims, then surely the Legislature did too," Br. 48, improperly equates the district court's standard of review under *Perry* with the State's more exacting standard under strict scrutiny.[24]

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on the question because its finding that CD35 is a racial gerrymander would necessitate reconfiguring the area anyway. C.J.S. App. 111a n.83, 172a n.38. Nonetheless, the intentional destruction of benchmark CD25 under the *Bartlett* constitutional test offers an alternative basis for invalidating Plan C235's racial carve-up of Travis County.

[24] Even if the 2013 Legislature's motivations were relevant, the district court specifically warned the State *not* to rely on its "preliminary determinations." C.J.S. App. 367a. The abundant caveats accompanying the interim plan provided Texas no legal or factual basis, let alone a "strong basis in evidence," *Alabama*, 135 S. Ct. at 1274, to believe that §2 required CD35's configuration.

The State's only substantive argument on strict scrutiny is that §2 required the creation of seven Latino opportunity districts in south/west Texas. But while the Legislature "may have had a strong basis in evidence for believing" this undisputed fact, it "had no basis in evidence to believe that the *Gingles* preconditions were satisfied in Travis County such that a race-based majority-Hispanic district should be drawn there." C.J.S. App. 176a. The mere fact that §2 required the creation of seven Latino opportunity districts does not give the State license to "draw a majority-minority district anywhere," even where the *Gingles* preconditions are not present. *Shaw II*, 517 U.S. at 916. The inclusion of Travis County "would not address the professed interest of relieving the vote dilution, much less be narrowly tailored to accomplish the goal." *Id.* at 917.

As detailed above, the mapdrawers knew full well that seven majority-minority districts could be drawn in the region—in satisfaction of §2—without the race-based carving of Travis County and the destruction of benchmark CD25. C.J.S. App. 181a n.47. Like the district court, this Court should reject Texas's invitation to bless its drawing of any old race-based district in any old configuration in purported service of §2. The question before the Court is not whether the State had good reasons to believe that §2 required seven Latino opportunity districts in south/west Texas, "one of which was CD35," Br. 47, but rather whether the legislature had good reasons to believe "that the race-based calculus it employed in [CD35] was necessary to avoid violating" §2, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 801 (2017); *see also Cooper*, 137 S. Ct. at 1469 ("race-based districting is narrowly tailored" to Voting Rights Act compliance "if a State

had 'good reasons' for thinking that the Act demanded such steps").

In its recent strict scrutiny analysis in *Cooper*, this Court rejected the State's proposed unconstrained approach to drawing majority-minority districts in purported service of §2. There this Court affirmed the lower court's finding that the State of North Carolina had no basis for revamping an existing crossover district in ostensible service to §2 requirements where evidence of the third *Gingles* precondition was lacking. 137 S. Ct. at 1470. Similarly here, the State had no reason to think that §2 required it to draw CD35 all the way into Travis County, where the Anglo population "did *not* 'vote[] sufficiently as a bloc' to thwart [minority] voters' preference," *id.* (quoting *Gingles*, 478 U.S. at 51), and dismantle the existing crossover district CD25. In short, "experience gave the State no reason to think" that §2 required Travis County Latinos to be drawn out of their preexisting crossover district and into a new majority-minority district. *Id.*

Indeed, just as North Carolina pursued a single-minded focus on achieving 50 percent minority VAP without reference to the third *Gingles* precondition, *see id.* at 1472, Texas mapdrawers pursued a single-minded focus on achieving 50 percent HCVAP in CD35 without regard to the presence of Anglo bloc voting, C.J.S. App. 179a n.45. The incidence of racial bloc voting in some areas of south/west Texas does not support the State's avowed need to extend CD35 into Travis County to avoid §2 liability. This Court has consistently rejected—and should once again reject—the misguided notion that because there is racial bloc voting somewhere, the State can draw a §2 remedy anywhere.

Texas cannot take advantage of either its procedural maneuvers or §2 to justify its race-based configuration of CD35. The voters of CD35 have cast ballots in this unconstitutional district in every election this decade. This Court should affirm the district court's invalidation of CD35 as an unconstitutional racial gerrymander.

IV. CD27 HAS ALWAYS BEEN AND STILL IS IN VIOLATION OF §2

The district court expressly found that "the Legislature violated §2 in *both result and intent*" in its configuration of CD27. C.J.S. App. 112a (emphasis added). The State provides no basis for overturning either finding. While the State points to other possible explanations for the Legislature's decision to excise Nueces County Latinos from the majority-minority district they enjoyed for over 25 years, it cannot escape the testimony from its own witnesses affirming the primary intent to protect the Anglo incumbent by drowning out the votes of Nueces County Latinos. The State's myopic focus on its creation of seven majority-minority districts in purported satisfaction of §2, moreover, falls away in the face of the unlawful racial gerrymander of CD35 and ignores this Court's well-established rule that a state cannot skirt the §2 rights of minority voters by substituting in a new opportunity district where §2 does not require it.

A. CD27 Intentionally Dilutes the Vote of Nueces County Latinos

The district court's findings lifted the veil from the State's defense of what it did to the nearly quarter million Latino voters in Nueces County. As detailed above, while voting in the county is highly racially polarized, Latinos there had had the opportunity for

more than a quarter century to elect their congressional candidates of choice. But the Legislature deliberately and cynically eliminated that ability, and intentionally diluted the votes of Nueces Latinos, by stranding them in the new Anglo-dominated district where they lost their voting rights opportunity. The evidence showed that this was by legislative design "to protect an incumbent who was not the candidate of choice of those Latino voters." C.J.S. 191a.

The court based its finding on a meticulous examination of the extensive trial evidence, including testimony from the mapdrawers themselves. *See* Supp. App. 287a-300a; C.J.S. App. 191a-92a. The mapdrawers were well aware that Representative Farenthold would likely not survive reelection in majority-Latino benchmark CD27, so they reoriented the district to pave the way to his victory and ensure defeat of the Latino-preferred candidate. In the Legislature's view, the long-acknowledged voting rights of Nueces County Latinos had to be sacrificed because they voted the wrong way. *See LULAC v. Perry*, 548 U.S. 399, 440 (2006) ("In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination[.]").

The State does not even attempt to justify the Legislature's decision to carve out Nueces County Latinos from their previous majority-minority district in service of Farenthold's reelection. To be sure, this Court has already rejected the State of Texas's argument that vote dilution is an acceptable means of incumbency protection. *See LULAC v. Perry*, 548 U.S. at 440-41. Over a decade ago, Texas argued that the reason for excising Latino voters from CD23 was to protect the incumbent "from a constituency that was increasingly voting against him." *Id.* at 440. This

Court clarified that incumbency protection may not be pursued at all costs.

> If the justification for incumbency protection is to keep the constituency intact so the officeholder is accountable for promises made or broken, then the protection seems to accord with concern for the voters. If, on the other hand, incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters. By purposely redrawing lines around those who opposed [the incumbent], the state legislature took the latter course. This policy, whatever its validity in the realm of politics, cannot justify the effect on Latino voters.

Id. at 441. Indeed, similar to *LULAC v. Perry*, the legislative policy here "becomes even more suspect," *id.*, when considered in light of the evidence that the State "replaced" CD27 with CD35 in purported satisfaction of §2 knowing full well that the contorted extension into Travis County had no §2 basis. *See supra* Part III; C.J.S. App. 178a ("In this way, they were able to create the facade of complying with §2 while actually minimizing the number of districts in which minorities could elect their candidates of choice despite the massive minority population growth that had occurred throughout the state."); *LULAC v. Perry*, 548 U.S. at 441 ("This use of race to create the facade of a Latino district also weighs in favor of appellants' claim.").

Notwithstanding the testimony from the mapdrawers, the State contends that the real motivation for including Nueces County in majority-Anglo CD27 was

"to keep Nueces County whole as the anchor of a congressional district" while establishing a new district anchored in Cameron County. Br. 51, 53.[25] In particular, the State points to "hearings held before the 2011 legislative session" as the source for the reorientation of Nueces County and the concomitant electoral isolation of its 206,000 Latino residents. Br. 51. But the district court pored over the abundant testimony from those hearings and found significant inconsistencies with both the State's proffered explanation and the resulting map. *See* Supp. App. 295a. Indeed, "no one suggested" that Nueces County should be grouped with the host of majority-Anglo counties to its north, *id.*, yet that is precisely the configuration the mapdrawers chose—and precisely the means of diluting the vote of Nueces County Latinos. C.J.S. App. 189a-190a.

The State's contention that it was driven by a desire for Nueces County to anchor a district is further belied by the actual configuration and performance of CD27. While Nueces County voters controlled the outcome of CD27 elections in the *benchmark* plan, *see* Supp.

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[25] The State's citation to *Personnel Administrator of Massachusetts v. Feeney* as the governing standard for discriminatory intent conveniently omits two important qualifiers. First, the *Feeney* test asks whether the government decision was "at least *in part* 'because of'" its adverse effects on an identifiable group. 442 U.S. 256, 279 (1979) (emphasis added). *Feeney* further notes that when the adverse consequences of the law at issue on an identifiable group—here, minority voters—are virtually inevitable, "a strong inference that the adverse effects were desired can reasonably be drawn." *Id.* at 279 n.25. Where the State equated minorities with Democrats, and then used the division of minority communities as the tool to harm Democrats, the inference is unavoidable that the adverse effects on minorities also were intended.

App. 296a ("In benchmark CD27, Nueces County's registered voters made up just over 50% of the total registered voters."); Rod. Ex. 955 (63.3 percent of votes cast in 2010 general election in benchmark CD27 were from Nueces County), Nueces County voters *lost* control of the election once the district was reoriented to include "twelve heavily Anglo Central Texas counties," Supp. App. 294a, 296a ("In new CD27, Nueces County voters are no longer the majority of registered voters in the district."); Rod. Ex. 956 (65.1 percent of votes cast in 2012 general election in CD27 were from outside Nueces County). Indeed, the mapdrawers "did no analysis to see whether Nueces County could control the election in the new CD27 and did not know if it could." Supp. App. 296a. The fact that mapdrawers managed to fail in meeting what the State now proffers as the main goal driving CD27 reveals the pretextual nature of that claim.[26]

The State's alternative explanation for the configuration of CD27 was thoroughly considered and ultimately rejected by the district court. C.J.S. App. 193a. Even if the State's argument found some support in the record, the State provides this Court no basis for finding "clear error." *See Cooper*, 137 S. Ct. at 1465 ("A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern.") (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 575

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[26] The State's contention that there were other ways "a nefarious mapdrawer" could have diluted the vote of Nueces County Latinos hardly exonerates it for choosing its preferred method of vote dilution. Br. 53. The dilution of minority voting strength "may be caused by the dispersal of [Latinos] into districts in which they constitute an ineffective minority of voters," as was done in CD27, "*or* from the concentration of [Latinos] into districts where they constitute an excessive majority." *Gingles*, 478 U.S. at 46 n.11 (emphasis added).

(1985)); *see also Anderson*, 470 U.S. at 573-74 ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). This longstanding rule of deference is surely applicable here, where the district court's ultimate conclusion of discriminatory intent came after it heard weeks of testimony and made credibility determinations of multiple decisionmakers central to the design of the challenged districts. *See Cooper*, 137 S. Ct. at 1478 ("A choice to believe 'one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence,' can 'virtually never be clear error.'") (quoting *Anderson*, 470 U.S. at 575).

Ultimately, the mapdrawers themselves acknowledged that creating a separate Cameron County-based district, protecting Representative Farenthold, and respecting the §2 voting rights of Nueces County Latinos was not a zero sum game. *See* Supp. App. 297a. Despite the multitude of options, and consistent with their statewide approach of using race to achieve maximum political gain for Anglo Republicans, mapdrawers chose the one configuration that unnecessarily isolates Nueces County Latinos from an opportunity district and drowns out their electoral power in Anglo-dominated CD27.

B. CD27 Violates § 2's Effects Test

Regardless of the motivation behind CD27, the discriminatory impact on Latino voters in Nueces

County who have been unlawfully deprived of the equal opportunity to elect their candidates of choice persists in CD27. The "approximately 200,000 Hispanic voters in Nueces County (a majority-HCVAP county) [who] had a §2 right that could be remedied but was not" have suffered from the practical effects of vote dilution in every election held this decade. C.J.S. App. 181a.

After examining each of the necessary elements for a §2 violation, the district court found that CD27 "has the effect of diluting Nueces County Hispanic voters' electoral opportunity," C.J.S. App. 190a-91a. Specifically, it found that (1) "a district could be drawn in which Hispanics, including Nueces County Hispanics, are sufficiently numerous and geographically compact to constitute a majority HCVAP"; (2) "racially polarized voting exists such that an Anglo-majority would usually defeat" the Latino-preferred candidate; and (3) "[a] searching practical evaluation of 'past and present reality' and a functional view of the political processes indicates that the political processes are not equally open to Hispanics." *Id.* 190a.

The State does not dispute that the discriminatory effects of CD27 "may be carried over . . . from one version of a law to another." Br. 31-32. It argues only that Plan C235's incorporation of seven Latino opportunity districts in south/west Texas satisfies the first prong of the *Gingles* test and therefore forecloses a §2 claim. Br. 49-50. To be sure, Appellants, Appellees, and the district court all agree that §2 requires seven Latino opportunity districts in the area. *See* C.J.S. App. 112a. But that conclusion is the beginning, not the end, of the §2 inquiry.

The State's argument falters because it fails to account for the invalid racial gerrymander of CD35.

The State itself acknowledges that to establish the effects prong of a vote dilution claim, a plaintiff must prove that there is "'the possibility of creating more than the *existing* number of reasonably compact districts with a sufficiently large minority population to elect candidates of [the minority group's] choice.'" Br. 49 (quoting *LULAC v. Perry*, 548 U.S. at 430) (emphasis added). Once the CD35 constitutional violation is unraveled, removing the Travis County Latinos that were gerrymandered into the district, the "existing number" of Latino opportunity districts falls one short of the undisputed §2 requirement, and a Latino opportunity district still must be established somewhere in the South and West Texas envelope to replace it. This means that Nueces County and its large Latino population must be pulled back into the envelope in order to satisfy the State's §2 obligation. *See* Supp. App. 300a ("Including the population of Nueces County in the envelope makes it easier to draw seven Latino opportunity districts under §2 without including Travis County.").

This is the very thing the Legislature chose not to do when it designed CDs 27 and 35. It took Nueces County Latinos who had a §2 right and put them in an Anglo-dominated district where their rights could not be exercised. In exchange, mapdrawers carved up Travis County racially, placing nearly 150,000 Travis County Latinos in CD35, even though they did not have a §2 right. In short, it engineered a trade that took §2 rights from those who have them to provide a §2 remedy to those who do not. *LULAC v. Perry* holds that such a trade is itself a §2 violation.

> The Court has rejected the premise that a State can always make up for the less-than-equal opportunity of some individuals by

> providing greater opportunity to others. . . . [T]hese conflicting concerns are resolved by allowing the State to use one majority-minority district to compensate for the absence of another only when the racial group in each area had a §2 right and both could not be accommodated.

548 U.S. at 429. "Simply put, the State's creation of an opportunity district for those without a §2 right offers no excuse for its failure to provide an opportunity district for those with a §2 right." C.J.S. App. 181a (quoting *LULAC v. Perry*, 548 U.S. at 430).

The State offers little in response to the obvious parallels to *LULAC v. Perry*. According to the State, because the trade in *LULAC v. Perry* was deemed unlawful for the new district's failure to comply with the first *Gingles* prong, it has no bearing here, where the district court found the new district (CD35) failed to comply with the third *Gingles* prong. Br. 50. This is a distinction without a difference. This Court's holding in *LULAC v. Perry* rests not on the presence or absence of a specific precondition but on the presence or absence of "a §2 right." 548 U.S. at 430; *see also Shaw II*, 517 U.S. at 917 ("The vote-dilution injuries suffered by [individuals with a §2 right] are not remedied by creating a safe majority-[minority] district somewhere else in the State."). Texas's failure to grapple with the basis for the district court's §2 effects ruling is fatal to its appeal of the §2 invalidation of CD27. "Under § 2, the State must be held accountable for the *effect* of [its] choices in denying equal opportunity to Latino voters." *LULAC v. Perry*, 548 U.S. at 441-42 (emphasis added).

CONCLUSION

For the foregoing reasons, as well as the reasons provided by the district court, this Court should either dismiss this case for lack of jurisdiction or, alternatively, affirm the Order on Plan C235 entered by the district court on August 15, 2017.

Respectfully submitted,

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March 28, 2018

No. 17-626

IN THE

Supreme Court of the United States

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL.,
Appellants,

v.

SHANNON PEREZ, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Western District of Texas

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction over the present appeal.

2. Whether, if this Court has jurisdiction, it should affirm the district court's ruling that Texas violated the Fourteenth Amendment and Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, when its Legislature intentionally minimized minority voting strength in drawing seven Texas House of Representatives districts in Nueces, Bell, and Dallas Counties.

3. Whether, if this Court has jurisdiction, it should affirm the district court's ruling that Texas violated the results standard in Section 2 of the Voting Rights Act, 52 U.S.C. § 10301(b), with respect to the Texas House of Representatives districts drawn in Nueces County.

4. Whether, if this Court has jurisdiction, it should affirm the district court's ruling that Texas's use of race in crafting the boundaries of Texas House of Representatives District 90 in Tarrant County violated the Fourteenth Amendment.

RULE 29.6 STATEMENT

The Mexican American Legislative Caucus, Texas House of Representatives (MALC) is an official caucus of the Texas House of Representatives. MALC is also incorporated as a nonprofit, nonpartisan 501(c)(6) corporation titled Mexican American Legislative Policy Council. MALC has no parent corporation or publicly held company owning 10% or more of the corporation's stock.

The League of United Latin American Citizens (LULAC) is a 501(c)(3) organization. LULAC has no parent company and issues no stock.

The Texas State Conference of NAACP Branches is a nongovernmental corporation. It has no parent corporations and no stock.

The Texas Latino Redistricting Task Force is an unincorporated association. The Texas Latino Redistricting Task Force has no parent corporations and no stock.

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BRIEF FOR APPELLEES

Appellees (other than the United States) in the above-captioned case respectfully request that the Court dismiss this appeal for lack of jurisdiction under 28 U.S.C. § 1253 or, alternatively, that the Court affirm the district court's order.

JURISDICTION

Appellants invoke this Court's jurisdiction under 28 U.S.C. § 1253. Brief for Appellants ("Texas Br.") 3. As explained below, this Court lacks jurisdiction at this time. *See infra* pages. 29-34.

INTRODUCTION

Appellants ("Texas" or the "State") and the United States profoundly mischaracterize what this case is about. They would have this Court regard the Texas House of Representatives ("state house") districts at issue here as "court-drawn" or "court imposed," Texas Br. i, 9, 28, 32, 33, 34, 35, 39, 41, 45, 64, or part of a court's "own" plan, Brief for the United States as Appellee in Support of Appellants ("U.S. Br.") 24. To the contrary: As Texas itself insisted the last time this dispute came to the Court, these districts reflect the State's "choices"—not any court's, Br. for Appellants at 18, *Perry v. Perez*, 565 U.S. 388 (2012) (Nos. 11-713 et al.).

Six of the districts—HD32 and HD34 in Nueces County; HD54 and HD55 in Bell County; and HD104 and HD105 in Dallas County—were drawn by the Texas Legislature in 2011 without any judicial involvement and were reenacted, without change, by the Legislature in 2013. The district court's preliminary decision in 2012 to leave those districts in

place when it drew interim remedial districts elsewhere in the State did nothing to change those districts' fundamental character. A seventh district, HD103 in Dallas County, was drawn by the Legislature in 2011 without any judicial involvement, was left unchanged by the district court in 2012, and was reenacted in 2013 with immaterial changes proposed by a legislator, H.J.S. App. 23a. And even the State admits that the eighth district at issue, HD90 in Tarrant County, is of Texas's own devising. *See* Texas Br. 64, 68.[1]

The court below found that both the original enactment and the reenactment of the districts at issue here was infected by purposeful racial discrimination. But the court has not yet enjoined Texas from using the districts. Texas filed this appeal before the court could hold a remedial hearing. Nothing in 28 U.S.C. § 1253 gives this Court power to hear this premature appeal. But if this Court does reach the merits, it should reject Texas's attempt to cement discriminatory districts into place.

STATEMENT OF THE CASE

Based on a "voluminous record," J.A. 117a (Order Denying Motion for Entry of Judgment under Rule 54(b) (Jan. 5, 2017)), the court below issued a series of lengthy opinions and orders setting forth detailed

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[1] "H.J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 17-626. "C.J.S. App." refers to the appendix to the Jurisdictional Statement in No. 17-586. "M.D.A. App." refers to the Appendix to the Motion to Dismiss or Affirm of Appellees Mexican American Legislative Caucus, et al., in No. 17-626. "Task Force M.D.A. App." refers to the Appendix to the Motion to Dismiss or Affirm as to House District 90 in No. 17-626.

findings of fact concerning what happened in the relevant time period—the biennium from 2011 to 2013.

Redistricting after the 2010 census

The 2010 census showed that Texas's population had grown by over four million since 2000. *Perry v. Perez*, 565 U.S. 388, 390 (2012) (per curiam). That growth was not evenly distributed around the State. *See* M.D.A. App. 2a. Thus, to comply with one person, one vote, Texas had to redraw the districts from which state representatives are elected. *Perry*, 565 U.S. at 390.

The district court described the context in which the Legislature undertook the post-2010 round of redistricting as one "of strong racial tension and heated debate about Latinos, Spanish-speaking people, undocumented immigration and sanctuary cities, and the contentious voter ID law." C.J.S. App. 302a. In all four counties relevant here, members of racial or ethnic minority groups accounted for most or all of the population growth. In Nueces County, the growth "was attributable to Hispanics, as both African-American and Anglo population declined." M.D.A. App. 91a. In Bell County, "more than 70% of the growth" was attributable to an increase in the minority population. *Id.* 278a. In Dallas County, the minority population grew by 350,000, while the Anglo population "decreased by over 198,000." *Id.* 222a. And in Tarrant County, "almost 89% of the growth was non-Anglo." *Id.* 257a, 266a.

Nonetheless, Republican legislators "were very resistant to creating any new minority opportunity districts." M.D.A. App. 4a-5a. They worried any such

districts would likely elect Democrats. *Id.* As a result, "[d]espite the massive minority population growth," the Legislature "not only failed to create any new minority opportunity districts, it *reduced* the number of minority opportunity districts." H.J.S. App. 191a. Its plan, enacted into law as 2011 Tex. Sess. Law Serv. ch. 1271 (H.B. 150), is known as Plan H283.

2011: Designing the challenged districts in Nueces, Bell and Dallas Counties

The configuration of each of the challenged districts in Nueces, Bell, and Dallas Counties has remained unchanged (with the exception of an immaterial change to one district in Dallas County) since they were first drawn by the Legislature in Plan H283. The district court made extensive findings regarding the districts' configurations, the legislative intent behind those configurations, and the consequences of those configurations for the voting power of minority citizens.

1. *Nueces County.* "In both 2000 and 2010, Nueces County was majority Hispanic [in total] population and majority HCVAP [Hispanic citizen voting-age population]." M.D.A. App. 91a. Under the plan in effect prior to 2011, the county (whose largest city is Corpus Christi) elected representatives from three districts—two located completely within the county and one shared with adjoining counties. *Id.* 89a-90a. It was "undisputed that Nueces County had two benchmark Latino opportunity districts" under the pre-2011 plan. H.J.S. App. 126a. Although those districts had previously elected Latino voters' candidates of choice, they had elected candidates opposed by a majority of Latino voters in 2010. *See* M.D.A. App. 90a-91a.

Because Nueces County's population grew relatively slowly between 2000 and 2010 compared to the rest of Texas, it became possible during the 2011 redistricting to place the entire population of the county within two districts, rather than giving it a share of three. M.D.A. App. 89a, 91a. Early in 2010, a staff member of the Texas Legislative Council wrote to the chief of staff to the Speaker of the state house: "Corpus—Two seats only; three R's. And worse[,] one of the seats will probably have to be more Hispanic than the other and probably elect a D." *Id.* 92a. With respect to the two benchmark districts that were majority-Latino, the Speaker mentioned to potential Latino candidates that "one of their seats was not going to be there for the next session." *Id.* 91a-92a.

The district court found that it would in fact have been possible to draw two majority HCVAP districts entirely within Nueces County. *See* H.J.S. App. 44a (pointing to a plan with districts that were 55.2% and 59.9% HCVAP). But "[r]ather than exploring" this possibility, the Legislature instead "drew one safe district for Hispanics and one safe district" for an Anglo incumbent, *id.* 59a. Along the way, the mapdrawers justified their refusal to draw a second Latino opportunity district by invoking a different measure of Hispanic population "*because* [that measure] was lower [than HCVAP] (and lower than 50%)," *id.* at 134a (emphasis added), thus making it seem as if the Latino community could not satisfy the

first precondition for creating an opportunity district under *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).[2]

As compared to the number of residents who would be included in two ideally populated districts, Nueces County was overpopulated by roughly 5000 people. But rather than splitting the excess population between the county's districts, the Legislature, with "[n]o explanation" for its decision, underpopulated HD32—the safe Anglo seat—by 563 people, producing a district where 46.3% of the citizens of voting age were Latino. M.D.A. App. 101a. It then overpopulated HD34—the majority Latino district—by 5,512 people, creating a district where Latinos constituted 65.9% of voting-age citizens. *Id.*[3]

In assessing why Texas had assigned so many more voters to the heavily Latino district, rather than allocating the overage more evenly between the two districts as an alternative proposal had suggested, the court below found that "[t]he only potential

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[2] The mapdrawers "felt" they could "offset" the retrogression caused by eliminating HD33, a benchmark Latino opportunity district in Nueces County, "by creating a new Hispanic opportunity district in a different part of the State." M.D.A. App. 96a. But the two districts in which they increased the Latino population provided no offset because they were "already performing for Latinos." *See id.*

[3] CVAP percentages are calculated using five-year rolling American Community Survey (ACS) data from the Census Bureau. *See* U.S. Census Bureau, *Voting Age Population by Citizenship and Race (CVAP)*, https://tinyurl.com/CVAPData (last visited Mar. 19, 2018). Using 2005-2009 data, HD32 was 44.2% HCVAP, and HD34 was 64.6% HCVAP; using 2008-2012 data, both districts' HCVAP percentages had increased, showing that Latinos formed an increasing share of Nueces County's potential electorate. *See* M.D.A. App. 101a.

explanation given by Defendants" at trial—"that mapdrawers sought to draw HD34 as a district that would perform reliably for Latino voters"—was "demonstrably *not* the reason for the population disparity." H.J.S. App. 255a n.81.

Instead, the evidence showed that the mapdrawers—"including specifically" Todd Hunter, an Anglo incumbent from Nueces County—drew the districts in that county to "undermine Latino voting strength." H.J.S. App. 136a. The "convoluted line" between HD32 and HD34, *id.* 132a (quoting the United States's post-trial brief), included ten split precincts. This "indicat[ed] that mapdrawers were likely using race to assign population since accurate political data is not available below the precinct level." *Id.* 136a. That "jagged boundary line" included a "strategic" boot-shaped "extension" that resulted in the safe Anglo district's capturing a Latino area that was "low-performing" with "low turnout." M.D.A. App. 102a. Meanwhile, the extension "removed [from the safe Anglo district] two potential Hispanic rivals" who had legislative experience—one of whom was a Republican. M.D.A. App. 102a; *see id.* 90a. In short, the Legislature "intentionally packed Hispanic voters" into a safe Latino district "to minimize their number and influence" in Nueces County's other district. H.J.S. App. 136a.

The district court also found that the configuration of HD32 and HD34 violated the "results"

test of Section 2 of the Voting Rights Act. *See* H.J.S. App. 44a-61a.[4]

As already described, the district court found it was possible to draw two majority-Latino districts, *see* H.J.S. App. 44a, thus satisfying the first precondition for a "results" claim under the framework established in *Gingles*, 478 at 50-51. The district court also found the second and third requirements to be met, given the "high levels of racially polarized voting in Nueces County." H.J.S. App. 48a-49a. And turning to the totality-of-the-circumstances inquiry, the district court emphasized Texas's "long history" of voting-related discrimination, including "intentional vote dilution in the Legislature's enactment of the 2011 plan," *id.* 51a, and the "continuing pattern of disadvantage" suffered by Latinos in Nueces County that hindered their ability to participate effectively in the political process, *id.* 52a-53a.

The district court expressly left open the question of an appropriate remedy. H.J.S. App. 61a. With respect to the Section 2 "results" violation, it pointed to the potential tradeoff this Court had identified in *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003), between fewer but safer districts on the one hand and more, but more competitive, districts on the other. H.J.S. App. 60a. It then advised appellees to consider whether they would press their claim for a second opportunity district if the two districts had to be drawn

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[4] Regardless of the intent with which a jurisdiction apportions its seats, an apportionment plan violates Section 2's "results" test "if, based on the totality of circumstances," minority citizens show that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

entirely within Nueces County (rather than crossing county lines to create districts with a higher percentage of HCVAP, as appellees were seeking to have the court order). *Id.* 60a-61a.

2. *Bell County.* Killeen, Bell County's largest city, has a diverse, and growing, majority-minority population. M.D.A. 283a; *see* H.J.S. App. 181a-82a. Under the pre-2011 apportionment, the entire city, save a "minuscule, 200-resident split," was located within HD54. *Id.* 270a. The pre-2011 HD54 also contained all of Burnet and Lampasas Counties. M.D.A. App. 277a.

After the 2010 census, HD54 was overpopulated by nearly 29,000 people. M.D.A. App. 278a. "Minority population growth [had] accounted for more than 70% of the growth in Bell and Lampasas Counties" since 2000. *Id.* Because Bell and Burnet Counties were now too populous to share a district, Plan H283 removed Burnet County and its 42,000 residents from HD54. *Id.*; H.J.S. App. 270a.

To make up for the removed population, the Legislature needed to add 13,000 people to HD54. H.J.S. App. 270a. Minority members of the Legislature introduced plans "that would have kept [Killeen] more whole" than did Plan H283, "but they were rejected." *Id.* 19a. "[I]nstead of adding voters to the existing core of HD54, which already contained almost the entire City of Killeen," *id.* 179a, the Legislature "removed *more* population from HD54"—splitting off more than 30,000 Killeen residents, "about two-thirds of whom were minorities," and assigning them to "already heavily Anglo HD55." *Id.* 270a-71a. To compensate for that change, legislators moved "47,000 mostly Anglo persons [in] southwest Bell County" from HD55 to

HD54. *Id.* 270a. The upshot was that voters of color in Killeen found themselves split between two majority-Anglo CVAP districts (HD54 and HD55). *See id.* 183a.

The primary architect of the lines in Bell County was HD54 incumbent Representative Jimmie Don Aycock, an Anglo. *See* M.D.A. App. 277a-78a. In his testimony at the 2014 trial, Aycock claimed that the lines were the result of a political compromise with the incumbent in HD55, who was also an Anglo. *See id.* 278a. He also attempted to explain why the Legislature had rejected alternative plans that would have kept Killeen together in one district. *See* H.J.S. App. 182-83a. For example, he objected to one such plan (Plan H201) "because it had a 'land bridge.'" *Id.* The court found this objection "pretextual" in light of the fact that Aycock had voted for Plan H283, which itself has land bridges elsewhere. *Id.* Aycock also admitted that he tried to avoid creating a majority-minority coalition district because it "would have probably got me unelected." M.D.A. App. 279a.

Ultimately, the court rejected Aycock's explanations for splitting Killeen as "not credible," M.D.A. App. 283a, as well as "unconvincing and pretextual," H.J.S. App. 19a. It found that "the decision to split Killeen and the minority community within it (removing minorities from HD54 and moving in Anglos) was to ensure that HD54 and HD55 remained Anglo-majority and to make HD54 less likely to perform for minority voters." *Id.* Accordingly, the court concluded that in adopting Plan H283, the Legislature engaged in "intentional vote dilution in Bell County." *Id.* 183a.

The court also found that the new configurations of HD54 and HD55 "exacerbated the existing

population deviations" between the districts. H.J.S. App. 271a. And the State offered no legitimate explanation for doing so. *See id.* Rather, the deviations were "exceedingly political and racial": Legislators "intentionally used race in a way that would overwhelm the remaining Latino voters of HD54 with the new influx of Anglo voters while also stranding a large portion of Killeen's minority voters in the already heavily Anglo HD55," diluting the minority community's potential political strength. *Id.* The population deviations were thus another way the Legislature illegitimately reduced minority political strength. *See id.*

3. *Dallas County.* Although the minority population in Dallas County had increased by almost 350,000 in the decade from 2000 to 2010, its Anglo population had decreased by almost 200,000, and the county had "lost population relative to the state as a whole." M.D.A. App. 222a. As a result, Dallas County was allocated fourteen state house seats rather than the sixteen it had held under the benchmark plan. *Id.*

Under the benchmark plan, there had been two Latino opportunity districts in the county: HD103 and HD104. H.J.S. App. 166a-67a. A third district, HD105, was among those "on track to provide minority opportunity." *Id.* 166a. In 2008, it came within 19 votes of electing the minority-preferred candidate to the state house, and in seven of nine statewide elections that year, the minority's preferred candidate received a majority of the vote within HD105. *See* M.D.A. App. 220a-21a.

Although the county's minority population had substantially increased relative to the Anglo population, the Legislature drew no new minority

opportunity districts within the county in 2011. M.D.A. App. 222a. Instead, it rejected a number of proposals that would have created districts without Anglo majorities. *See id.* 237a-40a. And it redrew HD105 to ensure that the district would not perform for minorities. *See* H.J.S. App. 170a. As a result, under Plan H283, Anglos controlled nearly 60% of Dallas County's house seats with only one-third of its population. *Id.* 166a.

With respect to the northeastern part of the county, the district court found insufficient proof that the Legislature had acted for racially discriminatory (rather than partisan) reasons. H.J.S. App. 169a-70a. But the court concluded that in western Dallas County, the district lines for HD103, HD104, and HD105 were drawn "in a racially discriminatory manner to intentionally dilute minority voting strength." *Id.* 170a.

The district court based this finding on considerable evidence. First, HD103 and HD104—the county's only majority-Latino opportunity districts under Plan H283—were two of the most overpopulated districts in the county. M.D.A. App. 43a; H.J.S. App. 261a. Ryan Downton, who assisted the Legislature in drawing the districts in Dallas County, did not address Representative Anchia's objection that his district (HD103) was unnecessarily overpopulated, and Downton did not confer with Representative Alonzo of HD104 at all. H.J.S. App. 170a, 263a.

Second, the "bizarre configuration" of district lines for all three districts, M.D.A. App. 244a-45a; *see also* J.A. 454-58, suggested that minorities had been taken from HD105 and packed into HD103 and HD104. HD103 and HD104 had two of the lowest perimeter-to-

area compactness scores in the 2011 plan. M.D.A. App. 244a HD105's design was also "a drastic change from the benchmark." H.J.S. App. 262a. The court noted an "HD103 arm" reaching west into HD105, scooping up heavily concentrated Latino populations in Irving. M.D.A. App. 228a-29a. It also described a "jagged, bizarrely shaped" protrusion extending from HD105 into HD104, which took "disproportionately Anglo" populations from HD104 and added them to HD105. *Id.* 230a-31a; *see also* H.J.S. App. 262a (describing HD105's protrusion into HD104 as "the least Hispanic channel that could have been drawn").

Third, the manner in which the districts were drawn also defied traditional, nonracial districting criteria. The boundary of HD105, for instance, "breaks up numerous communities of interest," dividing the cities of Grand Prairie and Irving. M.D.A. App. 230a. The district lines also split a significant number of precincts, including ten in HD103's arm into HD105 and seven that diverted Latino populations in Grand Prairie into HD104. *Id.* 228a, 241a. Residents of split precincts excluded from HD105 were "disproportionately Hispanic"; those included in HD105 were "disproportionately Anglo." *Id.* 231a.

Downton, the principal architect of the Dallas County districts, admitted at trial that he "drew lines and split precincts based on race to put Anglos in HD105" and to "put Latinos in HD103 and HD104." M.D.A. App. 255a. And the fact that western Dallas County had so many split precincts led the Court to conclude that the mapdrawers were relying on race to manipulate district lines and enhance the political performance of the districts for Anglos. H.J.S. App.

171a; *see id.* 136a (explaining that "accurate political data is not available below the precinct level").[5]

Downton claimed to have packed minority voters into HD103 and HD104 to comply with the Voting Rights Act, but the district court deemed Downton's statement "not credible." H.J.S. App. 171a-72a. The court noted in particular that "there [was] no indication that any election analysis was done" to see whether HD103 and HD104 needed additional minority population in order to remain opportunity districts. *Id.* 172a. In light of the other evidence, the court determined that Downton's reliance on the Voting Rights Act was "superficial" and "in bad faith." *Id.* 171a-72a. It found that "the true motive" of the district configurations "was to dilute Latino voting strength in west Dallas County by unnecessarily placing Latinos in HD103 and HD104"—that is, packing them into those districts to "waste Latino votes"—"while simultaneously making HD105 more Anglo." *Id.* 172a. Based on this "compelling" evidence, *id.* 263a, the court ruled that HD103, HD104, and HD105 had been intentionally designed to dilute Latino voting strength.

2012: The interim remedy

1. Because Texas was then a jurisdiction covered by the preclearance obligation of Section 5 of the Voting Rights Act, 52 U.S.C. § 10304, Texas could not immediately implement the legislative apportionment embodied in Plan H283. It sought preclearance from

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[5] As the United States argued at trial, splitting precincts also disproportionately depresses voter turnout among minority voters. *See* U.S. Proposed Findings of Fact and Conclusions of Law ¶ 119 (Oct. 30, 2014) (ECF No. 1278).

the U.S. District Court for the District of Columbia. *See Texas v. United States*, 887 F. Supp. 2d 133, 138 (D.D.C. 2012) (three-judge court), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013).

At roughly the same time, a number of plaintiffs—including appellees here—filed suit in the U.S. District Court for the Western District of Texas challenging Plan H283 on a variety of constitutional and statutory grounds. The district court held off adjudicating their claims, awaiting decision from the D.D.C. on the State's preclearance request. *See* H.J.S. App. 318a. When it became clear that the D.D.C. would not preclear Plan H283 in time for the beginning of the 2012 election cycle, the district court had to "implement[] an interim plan so that the 2012 elections [could] go forward." *Id.* 302a. To meet that obligation, in the fall of 2011 the district court "dr[e]w an 'independent map' following 'neutral principles that advance the interest of the collective public good.'" *See Perry*, 565 U.S. at 396 (quoting the district court). That map was known as Plan H302.

2. That independent, court-drawn map no longer has anything to do with this case. Texas immediately challenged Plan H302. In its appeal to this Court, Texas argued that the district court should instead have deferred, to the maximum extent possible, to the policy decisions embodied in the Legislature's Plan H283.

This Court agreed. It held that the district court had erred in drawing its own plan. *Perry*, 565 U.S. at 392, 396. The Court remanded the case to the district court and ordered that court to defer to "the State's policy judgments" and to "take guidance from the State's recently enacted plan"—that is, from

Plan H283—"in drafting an interim plan." *Id.* at 393. With respect to Fourteenth Amendment or Section 2 infirmities, the district court could depart from the Legislature's Plan H283 only where the challengers had demonstrated a likelihood of success on the merits. *Id.* at 394.

3. This Court issued its decision on January 20, 2012, at which point the district court had just over a month to respond before the 2012 election cycle got underway. Adhering to this Court's directive, the district court abandoned its independently drawn map. After submissions from the parties, the court adopted an interim remedy, denominated Plan H309. Order at 1 (Feb. 28, 2012) (ECF No. 682). The court emphasized that the "interim plan is not a final ruling on the merits of any claims asserted by the Plaintiffs in this case or any of the other cases consolidated with this case." *Id.* at 1-2. Three weeks later, on March 19, 2012, the court issued a twelve-page opinion "explain[ing] that plan." H.J.S. App. 301a.

Even on the preliminary record then before it, the district court found sufficient evidence of racial discrimination that it needed to "substantially" alter 21 of the 150 state house districts in Plan H283. H.J.S. App. 314a.[6]

Here are some examples of districts the court found it necessary to alter: HD117 in southwestern San Antonio had "target[ed] low-turnout Latino precincts" to aid an incumbent who "wanted to get more Anglo numbers." H.J.S. App.307a; *see also Texas*, 887 F. Supp. 2d at 172 (describing how "Texas

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[6] It made "minimal[]" alterations to an additional seven districts. H.J.S. App. 314a.

tried to draw a district that would look Hispanic, but perform for Anglos"). HD149 in Harris County had been 62% minority CVAP in the benchmark plan. *See* H.J.S. App. 312a. But the Legislature "chose to dismantle" this diverse, multiracial district that was electing the State's "first and only Vietnamese-American legislator." *Id.* 311a. And in El Paso County, the district court found that the line drawn between HD77 and HD78 was "bizarre, even for a legislative district." H.J.S. App. 313a. HD77 sported a set of "'deer antler' protrusions" designed to "grab predominantly Latino neighborhoods," *id.*, thereby protecting the incumbent in HD78 who was not the choice of the Latino community.

The 2012 opinion disposed of nearly all appellees' other claims—including those concerning the districts now before this Court— in a single sentence, reciting that the court had "preliminarily" found no likelihood of success on appellees' remaining "Section 2 and constitutional challenges," H.J.S. App. 303a. With respect to Nueces County, the court offered an additional one-sentence explanation of why the State could eliminate one of the benchmark Latino opportunity districts: "Because Nueces County does not have a majority [Spanish surname voter registration ("SSVR")] as a whole, the choice to remove one district required the elimination of one of the Hispanic ability districts." *Id.* 308a.[7]

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[7] The district court later explained that the State's earlier "insist[ence]," H.J.S. App. 134a, on using SSVR—rather than on CVAP, with respect to which Nueces County *was* majority Hispanic—as the exclusive measure of potential Latino voting strength reinforced the court's finding of discriminatory purpose. *See infra* pages 38-39.

The result of the preliminary ruling was that every one of the districts currently at issue in Nueces, Bell, or Dallas Counties was "left undisturbed from the enacted plan" and "configure[d]" in an "identical manner" to its configuration in the Legislature's Plan H283. *See* H.J.S. App. 303a & n.4 (capitalization altered). The only reason these districts needed to be included in the court's interim remedial order was that because they had not yet been precleared, only a federal court order could allow them to go into effect.

The district court took pains to "emphasize the preliminary and temporary nature" of its interim order, stressing that "except for the fact that PLAN H309 sets the districts for the 2012 elections, nothing in this opinion reflects this Court's final determination of any legal or factual matters." H.J.S. App. 303a, 314a. As the court later explained, it had been clear from the outset that its "analysis had been expedited and curtailed" and that its conclusions could "be revised upon full analysis." *Id.* 319a.

Six months after the court issued the order adopting interim Plan H309, the D.D.C. held that Plan H283 was retrogressive. *Texas*, 887 F. Supp. 2d at 166. Accordingly, that court did not then resolve the question whether the plan was also purposefully discriminatory. But it pointed to "record evidence that cause[d] concern" and "strongly suggest[ed]" that the retrogression "may not have been accidental." *Id.* at 177-78.

2013: Enacting the current state house apportionment

1. In 2013, in the wake of the decisions by the court below and the D.D.C. and while Texas's appeal

of the denial of preclearance was still pending, the Governor called a special session of the Legislature "to adopt the [district court's] interim map" as a permanent apportionment. H.J.S App. 5a.

It is important to remember that the "interim map" involved two distinct classes of districts. First, the court below had redrawn 28 of Plan H283's districts, 21 of them "substantially," in light of its preliminary finding that the existing configurations violated federal law. H.J.S App. 313a-14a. Those districts—*none* of which is now before this Court—can fairly be described as court-drawn or court-imposed. Second, the court had left 122 districts "exactly the same as those in the enacted plan"—that is, identical to the districts the Legislature had drawn in 2011 as part of Plan H283. *Id.* 314a. As to these districts, the court had simply "defer[red]" to "the legislative choices and district lines" made in Plan H283. *Id.* 356a n.42.[8]

The district court found that the Legislature was aware that pending challenges to the districts that had originated in Plan H283 and had remained unchanged since 2011 were likely to continue. H.J.S. App. 356a. It emphasized that "[t]he Legislature's own attorney, Jeff Archer, advised them" of this probability. *Id.*; *see also id.* 358a & n.45.

The district court found that the decision nevertheless to retain the original configuration of these "undisturbed" districts, H.J.S. App. 303a, "was not an attempt to adopt plans that fully complied with the VRA and the Constitution"; rather, "it was a

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[8] The district court's findings "concerning the intent of the 2013 Legislature" are laid out in its order on Plan C235. *See* H.J.S. App. 6a.

litigation strategy designed to insulate" the districts "from further challenge, regardless of their legal infirmities." *Id.* 355a. The Legislature hoped that by repealing the 2011 plan, the State could somehow wipe out the evidentiary significance of any findings of discriminatory intent in the initial design of the districts because it could then argue that that evidence applied only to a plan that no longer existed. *Id.* 357a-58a. The Legislature could then immediately reenact *exactly the same districts*—this time without discussion or debate or consideration of alternatives—and then argue that the silence provided no evidence to support a claim that the districts had been drawn for discriminatory reasons. This would enable Texas to "maintain the benefit of [the prior] discrimination." *Id.* 358a. The district court found this strategy "discriminatory at its heart." *Id.* 359a.

Pursuing this repeal-and-reenact strategy, the Legislature "pushed the [2013] redistricting bills through quickly." H.J.S. App. 354a. There was no "deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." *Id.* 353a. Instead, "the Legislature continued its steadfast refusal" to consider creating additional minority opportunity districts, *id.*, rejecting out of hand amendments proposed by Latino legislators, *see, e.g.*, *id.* 61a-62; Trial Tr. at 281 (July 14, 2017) (ECF No. 1546). But the Legislature did agree to an amendment proposed by an Anglo legislator that redrew one of the challenged districts in a way that introduced new constitutional infirmities. *See infra* pages 23-25.

In contrast to the bill enacting districts for the U.S. House of Representatives, which expressly "ratified and adopted" the "interim redistricting plan"

that had been "ordered" by the district court, Texas Br. Stat. App. 34a-35a, the bill enacting the new state house districts made no mention of the 2012 preliminary order. It simply listed the census tracts contained within each district. *See id.* 1a-32a.

The Legislature's 2013 apportionment is known as Plan H358. The district court described the plan as "heavily derived from the 2011 plans." Order at 13 (Sept. 6, 2013) (ECF No. 886). With respect to the districts in Nueces, Bell, and Dallas Counties now before this Court, that is an understatement. Six are identical to the districts initially drawn by the legislature in 2011: HD32 and HD 34 in Nueces County; HD54 and HD55 in Bell County; and HD104 and HD105 in Dallas County. A seventh, HD103 in Dallas County, was changed only slightly through a population swap with HD115. H.J.S. App. 23a.[9] The eighth district, HD90 in Tarrant County, was redrawn by the Legislature. *Id.* 70a.

2. The district court made clear that its general findings regarding the purpose behind the enactment of Plan H358 applied to the districts at issue in Nueces, Bell, and Dallas Counties.

With respect to the Nueces County districts, the court acknowledged that it had "not alter[ed] the districts in [its interim 2012] Plan H309." H.J.S. App. 28a. But it explained that it had then "lacked the benefit of the full record in making its preliminary determinations." *Id.* For example, in 2012, the court had "focused on" SSVR, the State's proffered measure of Hispanic population—a measure under which "it

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[9] No party has challenged that swap. H.J.S. App. 23a.

was mathematically impossible to draw two Hispanic districts wholly within" Nueces County. *Id.* 27a-28a. But a "review of the full record" revealed that the State *knew* that under a different, more commonly used measure, "the HCVAP of Nueces County was comfortably above 50%," making two Hispanic-majority districts possible. *Id.* 28a n.19. And yet the State "did not look into whether two majority-HCVAP Latino opportunity districts could be maintained." *Id.* 27a.

Based on the full record, the court found both that the Legislature had drawn the Nueces County districts in 2011 for discriminatory purposes and that because the tainted district lines "remain[ed] unchanged" in the 2013 plan, H.J.S. App. 30a, "that discrimination was purposefully maintained in Plan H358," *id.* 60a.

With respect to the Bell County districts, the court made a similar finding. There, too, the lines drawn by the Legislature in 2011 were carried forward into Plan H358 "unchanged." H.J.S. App. 20a. The court had earlier found that in configuring the Bell County districts, Representative Aycock had deliberately "divided the growing minority City of Killeen to protect his incumbency." M.D.A. App. 289a. The district court found that "the 2013 Legislature intended to continue the intentional discrimination found in Plan H283" with respect to the partition of Killeen. H.J.S. App. 22a. Thus, the racially discriminatory "intent and harm remain in Plan H358." *Id.*

Finally, the court found that the State's unlawful intent to minimize minority voting strength in western Dallas County remained unchanged in reenacting substantially identical districts in Plan H358. H.J.S.

App. 26a. HD 105's configuration had been designed to ensure that Latino voters, nearing the ability to unseat a representative who did not reflect their values, were frustrated in that political effort. *Id.* 167a. Nothing in the new plan "remove[d] or remed[ied] the intentional discrimination" inflicted in that part of the County. *Id.* 26a.

3. Unlike the other districts now before this Court, HD90 in Tarrant County (the home of Fort Worth) was given its current configuration in 2013. H.J.S. App. 70a. In 2011, rejecting a proposal by Anglo incumbent Lon Burnham that would have lowered the HCVAP of the district to 43.2%, *see* M.D.A. App. 12a, 259a-60a, the Legislature had adopted a configuration that was 49.7% HCVAP and 50.1% SSVR, *id.* 266a.

In 2012, Burnam very narrowly defeated a Latino opponent in the Democratic primary. Voting was racially polarized; Burnam's Latino opponent received 70.6% of the Latino vote while Burnam received the majority of Anglo and African-American votes. H.J.S. App. 72a. So in 2013, Burnam sought to revamp the district's boundaries to bring the Como community back into HD90. That community (which is heavily non-Latino) "had consistently and overwhelmingly supported him" in the past. *Id.* 83a. At the same time, Burnam strove to ensure that HD90 remained nominally a majority-Latino district with respect to SSVR, *id.* 73a, because the Chairman of the House Redistricting Committee, Drew Darby, was "fixated" on that figure, *id.* 82a.

To accomplish both goals, Burnam and his chief of staff, Conor Kenney, made unabashed use of race. Burnam directed Kenney to split precincts and swap census blocks to add Latino population and exclude

Anglo population in order to counterbalance the addition of Como. He admitted that "we really made some ugly lines" and "got rid of every white voter near the western boundary of the district to keep the Hispanic vote over 50 percent, but to get Como back into the district." H.J.S. App. 73a. Kenney "started by swapping whole precincts between the districts, but quickly began trading populations at the block level, using racial shading and [Hispanic voting-age population] as a proxy for SSVR." *Id.* Burnam testified that concern about population deviations got "lost in the process" because "we had to deal with taking as many white folks out as we could." *Id.* 74a.

During the floor debate on the redistricting bill, Burnam explained his amendment to the other legislators this way: it would "take the African American and Hispanic population out of Representative Geren's district and put[] some of my Anglo population into his district." H.J.S. App. 75a. Chairman Darby then urged the members to approve the amendment, stating that Burnam's final proposal "br[ought] the numbers back over 50%." *Id.* 81a. The amendment passed.

The district court found that while HD90 did not intentionally dilute Latino voting strength—as it happened, a Latino challenger defeated Burnam in the 2014 primary, H.J.S. App. 76a—the district was an unconstitutional racial gerrymander under the standard laid out by this Court in *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny. *See* H.J.S. App. 71a-84a. The court pointed to the "strong direct evidence" in Burnam and Kenney's testimony "explicitly acknowledging the use of race in their method" as well as Burnam's testimony "speaking candidly about there

being 'too many white people' in HD90." *Id.* 77a. The court termed Burnam's floor statements about "as naked a confession as there can be to moving voters into and out of districts purely on the basis of race." *Id.* 81a.

Applying strict scrutiny, the district court ruled that the State's "use of race in drawing HD90 was not narrowly tailored to achieve a compelling government interest." H.J.S. App. 82a-83a. The court saw no evidence that anyone considered the racial target "in terms of compliance with the VRA." *Id.* 82a. In particular, none of the witnesses provided "any meaningful testimony as to the potential significance of a 50% SSVR threshold." *Id.* Based on this evidence, and its evaluation of the witnesses' credibility, the court found that the State's invocation at trial of Voting Rights Act compliance to justify its focus on race lacked a "strong basis in evidence." *Id.* 81a.

Proceedings below

1. In response to Plan H358's enactment, a number of the plaintiffs (appellees here) received leave to amend their complaints (which had originally challenged the 2011 legislative apportionment in Plan H283). *See* H.J.S. App. 324a-25a.

One set of amendments related to appellees' claims against Plan H283: Because this Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), had released Texas from preclearance, appellees sought relief under Section 3(c) of the Voting Rights Act, 52 U.S.C. § 10302(c), seeking to reimpose

a preclearance requirement on the State. H.J.S. App. 324a.[10]

A second set of amendments brought challenges to Plan 358 under Section 2 of the Voting Rights Act and various strands of the Fourteenth Amendment. H.J.S. App. 325a.

2. In 2017, after a lengthy multipart trial, the district court issued a voluminous set of opinions. It upheld many districts that one or another plaintiff had challenged. *See, e.g.*, H.J.S. App. 11a-12a, 17a-18a, 67a-68a, 85a. But with respect to the districts now before this Court, the district court found intentional discrimination that violated the Fourteenth Amendment and Section 2 of the Voting Rights Act. (It also found that the Nueces County districts violated Section 2's "results" test.)

The district court held that the discrimination had to be "remedied." H.J.S. App. 85a. And it ordered the State to tell it whether the Legislature would "take up redistricting in an effort to cure these violations and, if so, when the matter will be considered." *Id.* 86a. Finally, it laid out a schedule for the court to analyze remedial possibilities in the absence of legislative action. *Id.*

3. Instead of responding to the district court, the State sought relief from this Court. On September 12,

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[10] In *Shelby County*, this Court struck down the coverage formula in Section 4(b) of the Act, 52 U.S.C. § 10303(b). *See* 133 S. Ct. at 2631. Section 3(c) of the Act authorizes a court that finds constitutional violations to order that a jurisdiction seek preclearance of any future changes to its voting laws "for such period as [the court] may deem appropriate." 52 U.S.C. § 10302(c).

2017, this Court granted a stay of the district court's order. *Abbott v. Perez*, No. 17A245. In January of this year, it set the case for argument, postponing decision on the question of jurisdiction.

SUMMARY OF ARGUMENT

Texas seeks to preempt, rather than appeal from, an order granting or denying injunctive relief. Its appeal is thus premature, and this Court lacks jurisdiction to hear it.

But if this Court concludes otherwise, its task is a straightforward one. Texas and the United States stake their arguments on the proposition that the challenged districts in Nueces, Bell, and Dallas Counties are "court-drawn," "court-imposed," or part of a court's "own plan." That premise is untrue. Once this Court recognizes that the challenged districts are legislatively drawn, first and last, the argument that this Court should accord Texas's decision a "particularly strong" "presumption of good faith," U.S. Br. 24, collapses.

Moreover, because the districts in Nueces, Bell, and Dallas Counties were crafted by the Texas Legislature in 2011 and carried forward essentially unchanged into the current apportionment statute, the district court was correct to look at the Legislature's intent in both 2011 and 2013. Texas offers only perfunctory responses to the district court's factual findings with respect to the discriminatory genesis of the challenged districts. The district court's detailed findings of fact, with respect to both the discriminatory intent with which the districts were drawn in 2011 and the discriminatory intent with which those district lines were carried forward in

2013, should be affirmed under the standard set out in Rule 52(a) of the Federal Rules of Civil Procedure and applied consistently by this Court in redistricting cases. This Court should not permit Texas to launder its tainted districts by passing them through a district court decision that did nothing more than decline to enter a preliminary injunction against them.

Texas is also wrong to claim that a district drawn with racially discriminatory intent cannot violate the Fourteenth Amendment or Section 2 of the Voting Rights Act unless plaintiffs satisfy the threshold requirements for establishing a Section 2 "results" claim. To the contrary: As long as a purposefully discriminatory apportionment has a discernible discriminatory effect, it violates the Constitution and Section 2 regardless whether it would be possible to draw additional majority-nonwhite districts. And with respect to the Nueces County Section 2 "results" claim, Texas's arguments go only to the question of remedy, not the question of liability.

Finally, with respect to HD90, the State does not contest the district court's finding that race was the predominant motive for how the lines were drawn in 2013. Nor could it. It claims only that the district survives strict scrutiny because the Legislature had a "strong basis" for considering race in order to comply with Section 2. Texas Br. 68. The district court rejected that claim because it found "no evidence that any legislator or staffer" considered the "effect on Latino voting ability in HD90" when drawing the district's boundaries. H.J.S. App. 81a-82a. Thus, as with the districts in the other three counties, the State simply repeats its version of the facts, completely ignoring the

district court's contrary factual findings and the applicable standard of review in this Court.

ARGUMENT

I. The Court should dismiss this appeal for lack of jurisdiction.

The time it takes to litigate redistricting cases is frustrating to everyone, appellees most of all. Under the best-case scenario, a majority of the elections this decade will have been held under a plan that violates the Constitution and the Voting Rights Act. But that devastating fact cannot confer jurisdiction on this Court to hear Texas's appeal. If this Court were to buy Texas's jurisdictional argument, the upshot would be many more cases in which justice is delayed.

1. Texas blows by the plain language of 28 U.S.C. § 1253, which gives this Court jurisdiction to hear appeals from three-judge district courts only with respect to "order[s] granting or denying . . . an interlocutory or permanent injunction." Section 1253 does not give this Court appellate jurisdiction over other sorts of orders, no matter how important those orders might be to the parties. This is so even with respect to orders that conclusively determine the unconstitutionality of a statute, *Gunn v. Univ. Comm. to End the War in Viet Nam*, 399 U.S. 383, 388-91 (1970), or grant declaratory relief, *White v. Regester*, 412 U.S. 755, 760-61 (1973); *Mitchell v. Donovan*, 398 U.S. 427, 430-31 (1970) (per curiam). Thus, in *Goldstein v. Cox*, 396 U.S. 471 (1970), the Court emphasized "that its jurisdiction under the Three-Judge Court Act is to be narrowly construed" because "this Court above all others must limit its review of interlocutory orders." *Id.* at 478.

2. Ignoring that directive, the United States and Texas seek to borrow a construction of 28 U.S.C. § 1292(a)(1)—the jurisdictional statute applicable to the courts of appeals—that permits those courts to entertain interlocutory appeals beyond the "limited exception to the final-judgment rule" provided by the section itself, *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981). In exceptional circumstances, a party can appeal even absent the grant or denial of an injunction if a district court's order has the "practical effect" of an injunction. *See* Texas Br. 19 (quoting *Carson*, 450 U.S. at 83); *see also* U.S. Br. 20.

Neither Texas nor the United States cites a single case in which this Court has adopted that loose construction with respect to Section 1253. Indeed, such a relaxation would directly contravene this Court's declaration in *Goldstein*.

In fact, this Court has squarely refused to create a "practical effect" exception to Section 1253's textual limitation. In *Gunn*, for example, a three-judge court struck down a provision of the Texas Penal Code. 399 U.S. at 384-86. Like the district court below, the court in *Gunn* gave the state legislature an opportunity to cure the defect rather than immediately enjoining the provision. *Id.* at 386. Under the theory the State has pressed here, one would expect this Court to have entertained the appeal in *Gunn* because the district court's legal ruling, together with its suggestion that the state remedy the defect, "put[] the state on the clock" to amend its law or face remedial proceedings, Texas Br. 23.

But this Court held that it lacked jurisdiction. That was not because the Court overlooked the practical effect of the district court's ruling. The Court

recognized that a state official "confronted" with a federal court opinion holding a statute unconstitutional "would no doubt hesitate long before disregarding it." *Gunn*, 399 U.S. at 390. Nevertheless, this Court saw "no power" to "deal with the merits of th[e] case in any way at all" because no injunction had been granted or denied. *Id.* This principle applies with equal force in the context of redistricting. In *Whitcomb v. Chavis*, 403 U.S. 124 (1971), the Court rejected an initial appeal filed after the three-judge court ruled that a state legislative district was unconstitutional; the Court lacked jurisdiction because "no injunction had been granted or denied." *Id.* at 138 n.19.

Texas makes no effort to address *Gunn* or *Whitcomb*. Instead, it tries to deflect attention by claiming that the order here has "the exact same practical effect" as the orders underlying this Court's exercise of jurisdiction in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), and *Gill v. Whitford*, No. 16-1161 (U.S.). Texas Br. 22.

But the orders from which the parties appealed in those two cases satisfied the textual requirement of Section 1253. In both cases, the district court had expressly enjoined state officials from conducting any future elections under the challenged plan.[11] Thus, the officials in those cases, unlike the officials here, were

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[11] *See Whitford v. Gill*, No. 3:15-cv-00421-bbc, 2017 WL 2623104, at *1 (W.D. Wis. Feb. 22, 2017) (three-judge court) ("defendants are enjoined from using the [challenged] districting plan . . . in all future elections"); *Harris v. McCrory*, No. 1:13-cv-00949-WO-JEP, at 1 (M.D.N.C. Feb. 5, 2016) (three-judge court) (ECF No. 143) (state officials are "enjoined from conducting any elections for the office of U.S. Representative until a new redistricting plan is in place").

subject to "an extraordinary writ, enforceable by the power of contempt," *Gunn*, 399 U.S. at 389. And it was absolutely clear that no further elections would take place under the challenged plans.

The United States at least acknowledges the force of *Gunn* and *Whitcomb*. U.S. Br. 23. And it pointedly does not embrace Texas's expansive claim that *any* finding of liability combined with the tautological observation that there needs to be a remedy once a violation is found entitles a state to invoke Section 1253. But the United States then suggests that somehow the "timing pressures present here" transform an otherwise unappealable order into an injunction. U.S. Br. 23. It offers no explanation of exactly *how* that transformation occurs, or any standards to guide future litigants in knowing when an unappealable order becomes appealable. And on the facts, the timeframes in *Whitcomb* and this case are nearly identical.[12] The Court should reject this jury-rigged rule.

3. Adhering to the text of Section 1253 is not an exercise in arid formalism. Allowing premature appeals threatens unnecessary and excessive litigation.

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[12] In *Whitcomb*, the district court issued an opinion in July 1969, *see* 403 U.S. at 131, for an election cycle that was set to begin in earnest right after the New Year, *see Chavis v. Whitcomb*, 307 F. Supp. 1362, 1366 (S.D. Ind. 1969) (three-judge court), and ultimately issued a remedy in October, *see Whitcomb*, 403 U.S. at 139. Here, the district court issued its opinion in August 2017 with the next election cycle set to begin shortly after the New Year. Had Texas complied with the district court's order, a remedy could have been in place by October.

If Texas is right about when states can invoke this Court's appellate jurisdiction, then states will be free to appeal whenever a three-judge court issues even a partial summary judgment in a multiparty, multiclaim apportionment lawsuit. It is a truism that the law must furnish a remedy for the violation of a right. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). But that hardly transforms every declaration of a violation into a *de facto* injunction.

Texas's claim that interlocutory appellate jurisdiction is necessary to avoid the problem of "extremely expedited" review, Texas Br. 23, fares no better. That argument attempts to convert timing pressures *caused by* this appeal into justifications *in favor of* the appeal itself. Rewarding the State's efforts would produce a dangerous precedent for purposes of Section 1253. Given that primary and general elections occur on a two-year cycle and taking into account the calendar on which this Court operates, one party or another will nearly always be able to assert that an election deadline is impending and therefore justifies this Court's immediate review. Exigency is without doubt a necessary condition for Section 1292(a)(1)-style review, *see Carson*, 450 U.S. at 84, but it is not a sufficient one, and it cannot overcome the fact that nothing in the order below operates as an injunction.

Texas strays even further afield when it claims that it should be allowed to appeal in the absence of an injunction because this would somehow "even[] the playing field" between itself and appellees. Texas Br. 23. To be sure, if appellees' claims "had been definitively rejected," *id.*, appellees could have appealed. But that is because their request for

injunctive relief would necessarily have been denied, bringing them squarely within the terms of Section 1253. As the case stands, however, no one can "definitively" say in what ways the State might be forced to depart from the district lines its Legislature drew. Far from leveling the playing field, endorsing Texas's proffered "[p]ractical considerations" as justification for its appeal would unjustifiably tip the scales in the State's favor.

Make no mistake: Allowing states to appeal after a liability finding but before any injunction virtually guarantees that this Court will see recurrent appeals in redistricting cases. This would flout the well-settled principle that "piecemeal appellate review is not favored," particularly under Section 1253. *Goldstein*, 396 U.S. at 478. A state will have every incentive to appeal after a finding of liability without waiting to see whether a district court will in fact enjoin an upcoming election and without there being any potential remedy in place. If it loses, it will no doubt file a second appeal if the district court rejects its proffered remedy (if it even proffers one). And of course if a district court accepts the state's proposed remedy, or imposes its own, disappointed plaintiffs will then appeal. The consequence will be more litigation, and more delay in resolving redistricting cases.

In short, the district court has neither granted nor denied injunctive relief of any kind. That alone should dispose of this appeal. This Court shculd reject Texas's efforts to bend Section 1253 into a statute permitting appeals any time a state objects to a ruling in a redistricting case.

II. In the alternative, this Court should affirm the district court's finding that Plan H358 intentionally dilutes minority voting strength.

If this Court decides that it has jurisdiction over Texas's appeal, then it should accept the district court's finding that the Legislature adopted and maintained the configurations of the districts at issue in Nueces, Bell, and Dallas Counties for racially discriminatory purposes and hold that the districts violate both Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, and the Fourteenth Amendment. Texas's and the United States's arguments against doing so distort the facts, ignore the standard of review, and misread this Court's precedents.

A. The challenged districts originated in 2011 legislation that was tainted by discriminatory motivations and not in a court-imposed remedy.

1. Texas does very little to challenge the district court's finding that the 2011 process that produced Plan H283 was tainted by purposeful racial discrimination. (Indeed, Texas implicitly acquiesced in that finding when it abandoned any attempt to defend the 21 districts the three-judge court "reconfigured," H.J.S. App. 307a, after its preliminary ruling regarding the districts' likely unconstitutionality.) And the United States actually intervened in this case as a plaintiff to assert both that Plan H283 "had been adopted with racially discriminatory intent in violation of Section 2 and that Section 3(c) relief was warranted." U.S. Br. 13.

Instead, Texas claims that that finding, and the district court's detailed findings with respect to the

discriminatory intent that infected the creation of individual districts, is "legally irrelevant," Texas Br. 41, because in Plan H358 the Legislature "adopted unchanged districts that the court itself *ordered* the State to use in 2012," *id.* at 24.

The United States at least acknowledges that under this Court's precedents, the district court could properly "consider[] the 'historical background of' and 'sequence of events leading up to' enactment of the 2013 redistricting plans, including whether the 2011 Legislature acted with discriminatory intent." U.S. Br. 32 n.12 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977)). But it too asserts that the challenged districts were "adopted . . . without change from the court's own 2012 interim plan[]." U.S. Br. 24. Indeed, the United States goes on to propose that the "normal presumption" of constitutionality afforded to legislative enactments be "heightened by the State's acceptance of the judicial plan." *Id.* at 30. The United States repeatedly invokes that newfound, and "particularly strong," presumption, *id.* at 24, 32 n.12, 38, 40; *see also id.* at 37 (arguing that appellees should have to "adduce particularly persuasive evidence"), presumably because it thinks the presumption is indispensable to upholding the challenged districts.

Texas and the United States have gotten things exactly backwards. The district court—at this Court's direction, *see Perry v. Perez*, 565 U.S. 388, 393 (2012) (per curiam)—adopted the *Legislature*'s plan with regard to these districts; the Legislature did not adopt the *court*'s plan. The configurations of the challenged districts are entirely a product of lines drawn by the Legislature in Plan H283—as the district court

unanimously recognized. Order at 13 (Sept. 6, 2013) (ECF No. 886). The most accurate way to characterize the record is to say that the Legislature drew the districts in 2011 and that the district court permitted those unprecleared districts to go into effect for the 2012 election. Indeed, Texas's prior appeal to this Court was designed to achieve precisely that goal. Having successfully argued in 2012 that the court below should be required to implement Texas's plan to the maximum extent possible, Texas should not now be permitted to turn around and claim that the resulting plan was in fact the court's idea.

2. In any event, the district court's 2012 interim order could not provide Texas with a safe harbor.

The district court's 2012 order was avowedly "preliminary," H.J.S. App. 303a, 314a, and explicitly disclaimed any "final determination of any legal or factual matters," *id.* 303a. And as Texas itself acknowledged at the time, it is "well established" that any finding "made in connection with an award of preliminary relief is not a final ruling on the merits." Reply Br. for Appellants at 27, *Perry v. Perez*, 565 U.S. 388 (2012) (Nos. 11-713 et al.). Indeed, it has long been blackletter law that "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see also Community Nutrition Inst. v. Block*, 749 F.2d 50, 56 (D.C. Cir. 1984) (Scalia, J.) (noting that a court's "tentative assessment made to support the issuance of a preliminary injunction" is "not a final determination" and "is not even law of the case"); 18A Charles Alan Wright, *et al.*, *Federal Practice and Procedure* §4445, at 301 (2d ed. 2002) (a "[g]rant or

denial of interlocutory injunctions clearly does not foreclose further litigation in the same proceeding, so long as [the] decision rested on mere preliminary estimates of the merits or discretionary remedial grounds").

Given this well-established rule and this Court's unanimous "agree[ment]" that "a preliminary injunction holds no sway once fuller consideration yields rejection of the provisional order's legal or factual underpinnings," *Sole v. Wyner*, 551 U.S. 74, 78 (2007), Texas was on notice that there could be no assurance that the districts in Plan H283 would survive a full trial. No reasonable legislature could have thought that the 2012 decision was anything other than what it proclaimed itself to be: an "interim" order, H.J.S. App. 301a, that indicated "[n]othing" about the ultimate "merits as to any claim or defense in this case," *id.* 315a.

This case shows the wisdom of the principle this Court articulated in *Camenisch* and *Sole*. After a full trial, the district court made findings based on evidence that was unavailable at the time it ruled preliminarily on an interim plan for the 2012 elections. For example, in 2012, the district court did not realize that the State was emphasizing SSVR majorities in Nueces County because it was possible to draw two majority HCVAP districts. *See* H.J.S. App. 134a. Nor had it yet had the opportunity to hear from, and judge the credibility, of the legislator from Bell County who was instrumental in splitting the city of Killeen to fracture a large community of color between two Anglo districts. Nor had it heard from the architect of the challenged districts in western Dallas County, whose

explanations the court found to be "superficial" and "in bad faith." *See id.* 171a-72a.

3. If anything, the district court's 2012 remedial order actually was an early indicator that Plan H283 was tainted by purposeful racial discrimination. This Court has long recognized "the well-settled evidentiary principle" that "a finding of illicit intent as to a meaningful portion of the item under consideration has substantial probative value on the question of illicit intent as to the remainder." *Keyes v. Denver Sch. Dist. No. 1*, 413 U.S. 189, 207-08 (1973) (citing 2 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law 301-02 (3d ed. 1940)). The fact that even on a preliminary record the district court had found it necessary to "reconfigure[]," "restore[],"and "retract" portions of Plan H258, H.J.S. App. 307a, 314a, made it unreasonable for Texas to view the district court's interim order as an imprimatur on the remainder of its districts.

4. Because most of the challenged districts' boundaries in (legislatively drawn) Plan H283 in 2011 and their boundaries in (legislatively drawn) Plan H358 in 2013 were identical, the district court's expressly provisional acquiescence for the State to use those boundaries in 2012 does nothing to vitiate their status as purely legislative plans. So even if this Court were to agree with the United States's proposal to create a "heightened" presumption of constitutionality

when a state "accept[s]" a "judicial plan," U.S. Br. 30, that presumption would have no bearing on this case.[13]

Instead, with respect to the districts carried forward unchanged from Plan H283 to Plan H358, the 2013 simultaneous repeal and reenactment is nothing more than a legal fiction. As this Court long ago explained, when a statutory provision is replaced by one that is "almost identical," then "[n]otwithstanding" any "formal repeal," it is "entirely correct to say that the new act should be construed as a continuation of the old." *Bear Lake & River Waterworks & Irrigation Co. v. Garland*, 164 U.S. 1, 11 (1896); *see also Oneida County v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 246 n.18 (1985); 73 Am. Jur. 2d Statutes § 271 (West 2018); *see also Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 661-62 (1993) (treating an ordinance that was repealed and essentially reenacted as being continuously in effect).

B. The Legislature's 2013 reenactment of the challenged districts was purposefully discriminatory.

Plan H358 was drawn by "a substantially similar Legislature with the same leadership only two years after the original enactment" of Plan H285. H.J.S. App. 352a n.37. Texas argued before the district court that the reason it preserved the challenged districts unchanged (save for an immaterial modification of HD105) was that it believed that those districts had

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[13] The State did not just "accept" the interim plan; it changed a district (HD90 in Tarrant County) in ways that introduced new constitutional infirmities. *See supra* pages 23-25.

been approved by the district court and that retaining them would "avoid protracted litigation," Texas Br. 1.

Texas's reason for reenacting the districts, like all "determination[s] of a legislature's motivation," is "ultimately an issue of fact," as the United States forthrightly acknowledges. U.S. Br. 25 (citing *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999)). And as an issue of fact, it is one where the district court's resolution is entitled to great weight.

Here, the district court heard Texas's witnesses, found their proffered explanations pretextual, and ultimately rejected Texas's explanation on factual grounds. *See* H.J.S. App. 345a-46a, 348a, 353a-59a; *supra* pages 18-23. Instead, the district court found that the State stuck with its original districts because it "intended" to "maintain[]" the discriminatory "taint" that had originally motivated the districts while being "safe from remedy" through the ruse of repeal-and-reenact. H.J.S. App. 359a.

1. The district court's findings of fact with respect to the Legislature's intent in both 2011 and 2013 are entitled to significant deference. Last Term, this Court reiterated its longstanding recognition that a district court's "assessment" of the purposes behind a legislative apportionment plan "warrants significant deference on appeal to this Court." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). That is because the question whether a state's apportionment plan was adopted or maintained for a racially discriminatory purpose is a question of fact to be reviewed under Rule 52(a)'s deferential clear-error standard. *See Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982); *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) ("a finding of intentional discrimination is a

finding of fact"). So too is the question whether racial considerations predominated in a state's redistricting decisions. *Cooper*, 137 S. Ct. at 1465.

In fact-intensive redistricting litigation, a district court's assessment requires "particular familiarity with the indigenous political reality" and "'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (first quoting *Rogers*, 458 U.S. at 622, and then quoting *White v. Regester*, 412 U.S. 755, 769-70 (1973)). Still greater deference is required when those findings turn on the credibility of competing witnesses. This Court "give[s] singular deference to a trial court's judgments about the credibility of witnesses" because "the various cues that 'bear so heavily on the listener's understanding of and belief in what is said' are lost on an appellate court later sifting through a paper record." *Cooper*, 137 S. Ct. at 1474 (quoting *Anderson*, 470 U.S. at 575). The district court lived with this case for many years, through several trials at which it observed numerous witnesses. Its findings cannot be ignored, much as the State would like this Court to do so.

Under Rule 52(a), a reviewing court may not reverse the factfinder merely because it "would have decided the case differently." *Anderson*, 470 U.S. at 573. And "[w]here there are two permissible views of the evidence, the factfinder's choice between them" must control. *Id.* at 574; *accord Cooper*, 137 S. Ct. at 1465 ("A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern."). Rule 52(a) thus guarantees that the merits trial remains the "main event" rather than merely a

"tryout on the road" to appellate review. *Anderson*, 470 U.S. at 575 (citation omitted).

2. In the joint trial on the 2013 congressional and state house plans conducted during the summer of 2017, the district court heard extensive testimony with respect to the legislative process in 2013—evidence that provided direct support for its conclusion that the Legislature acted with a discriminatory motive. The district court properly relied on the guidance this Court provided in *Arlington Heights*, 429 U.S. at 264-68, for inquiring into legislative intent. *See* H.J.S. App. 340a.

The district court found that the Legislature did not actually believe that "passing the interim maps would end the litigation." H.J.S. App. 358 n.45. It pointed out that legislative leaders had made self-contradictory statements about the rationale for the reenactment and that the Legislature's own legal advisor had explained to legislators that reenacting the maps was unlikely to resolve the litigation. *Id.*

Additionally, the court found that the Legislature "pushed the [2013] redistricting bills through quickly" with no real discussion of district configurations. H.J.S. App. 354a. It further found that "'[t]his hurried pace, of course, strongly suggests an attempt to avoid in-depth scrutiny.'" C.J.S. App. 304a (quoting *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 228 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017)). Finally, the court found that the purported legislative findings regarding the 2013 plan were in fact produced ahead of time by the Texas Attorney General to provide cover for the Legislature's retention of the existing districts. H.J.S. App. 355a n.41.

One of the primary concerns of incumbents in Nueces, Bell, and Dallas Counties was to check the growing power of minority communities that could get them "unelected," M.D.A. App. 279a; *see supra* pages 4-7, 10-11. That incentive to dilute minority voting strength remained just as powerful in 2013 as it had been two years before. And as this Court recognized with respect to Texas's *last* round of reapportionment, shoring up an incumbent's district in the face of "diminishing electoral support" from a growing minority community "bears the mark of intentional discrimination that could give rise to an equal protection violation." *LULAC v. Perry*, 548 U.S. 399, 440 (2006).

Given all this evidence, the district court did not err in its ultimate finding of fact: that the 2013 Legislature's intent was to preserve the districts the Legislature had drawn in 2011 that had not already been struck down by the district court.

3. Texas is simply wrong to argue that any consideration of the intent behind Plan H283 is somehow a "once-bitten-forever-damned mentality," Texas Br. 34. Leaving aside that this case hardly involves "once" and "forever," this Court has consistently declared that courts adjudicating intentional discrimination claims can look at the historical evidence.

When a provision's "original enactment was motivated by a desire to discriminate . . . on account of race," and it "continues to this day" to have a discriminatory effect, then the provision "violates equal protection under *Arlington Heights*." *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). Evidence of past discrimination, as this Court explained in *Rogers v.*

Lodge, "is relevant to drawing an inference of purposeful discrimination, particularly in cases" where prior purposefully discriminatory enactments are "replaced by laws and practices which, though neutral on their face, served to maintain the status quo." 458 U.S. at 625. In particular, the fact that "[s]ome of the more blatantly discriminatory [provisions in a law]" have already been "struck down by the courts" in no way "legitimate[s]" the remaining provisions. *Hunter*, 471 U.S. at 233. Those principles bear directly on this case.

Texas is not telling the whole truth when it claims that it enacted Plan H358 because it "wanted to bring the litigation to an end." Texas Br. 2. The complete truth is that Texas wanted to bring this litigation to an end *in order to keep in place the districts its Legislature had drawn in 2011 for discriminatory reasons.*

If Texas had wanted to bring this litigation to an end correctly, it had two options. First, it could have drawn a new apportionment plan that neither intentionally nor unintentionally diluted minority voting strength. Had it done so, appellees would not have continued to challenge the districts. Second, Texas could have defended the merits of its districts and brought the litigation to an end by winning the case. What Texas cannot do is end the litigation by leaving the court at halftime and asking the referees to declare it the winner.

By deciding to retain the districts it had drawn in 2011, Texas retained both the assets *and the liabilities* of those districts. One of those liabilities is that the challenged districts in Nueces, Bell, and Dallas

Counties were the product of intentional efforts to dilute minority voting strength.

The district court was entitled to infer that when "a substantially similar Legislature with the same leadership" drew *exactly* the same districts "only two years after" it first created them, H.J.S. App. 352a n.37, it did so for the same reasons. That inference is particularly defensible when the reenactment was "pushed . . . through quickly," *id.* 354a, with no discussion or debate over concerns raised by minority legislators.

Under the circumstances, the district court was presented with only two explanations for the repeal-and-reenactment strategy: The State claimed it kept the 2011 lines in place in the challenged districts because it thought that the district court had somehow blessed them in 2012, and that the court would therefore rule in its favor on the merits; appellees claimed that the State kept the 2011 lines in place for the same reason it had adopted them—to dilute minority voting strength. The district court's decision to resolve this dispute against the State is the quintessential factfinding entitled to deference from this Court. The United States is wrong to label this an improper "presumption of persistent discrimination." U.S. Br. 32. The district court simply followed the evidence where it led.

Put another way, the finding of past discrimination here shows that the United States's argument about a "particularly strong" presumption in favor of Texas's Plan H358 has gotten things exactly backwards. As Justice Thomas explained in *United States v. Fordice*, 505 U.S. 717 (1992), when a state keeps in place a system originally adopted for

discriminatory reasons, that original intent remains relevant "both because the State has created the dispute through its own prior unlawful conduct and because discriminatory intent does tend to persist through time." *Id.* at 746-47 (Thomas, J., concurring) (citing *Keyes*, 413 U.S. at 209-10, and *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 309-10 (1977)).

The district court, in considering evidence from 2011 in adjudicating the legality of the 2013 plan, did not commit legal error. Indeed, ignoring that evidence would have been flatly inconsistent with this Court's precedent.

C. Plaintiffs in intentional vote dilution cases need not prove that it would be possible to draw additional majority-minority districts.

Texas's final argument with respect to the district court's findings of intentional discrimination rests on the premise that "to establish the effects prong of an intentional-vote-dilution claim, a plaintiff must prove that there is 'the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of [the minority group's] choice.'" Texas Br. 49 (first quoting *LULAC*, 548 U.S. at 430, and then quoting *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994)).

Texas is wrong. Neither of the cases it cites were resolved as intentional vote dilution claims. Applying the correct standard for assessing effects with respect to such claims under either Section 2 or the Fourteenth Amendment, this Court should reject Texas's argument that there was no "vote-dilutive

effect" in Nueces, Bell, and Dallas Counties, *see* Texas Br. 53-54, 58-59, 60-61.

1. Requiring plaintiffs to show the possibility of creating additional majority-minority districts is an artifact of a particular kind of claim: vote dilution under the "results" test of Section 2. As this Court explained in *Gingles*, this requirement is essential when the injury the plaintiffs assert is the state's failure to draw such a district. *See* 478 U.S. at 49-51. By definition, if such a district cannot be drawn, the state's failure to draw it cannot be the basis for liability. *See id.* at 50.

But as this Court has repeatedly recognized, an apportionment adopted for discriminatory reasons cannot be upheld even if its effect "was, standing alone, perfectly legal." *City of Pleasant Grove v. United States*, 479 U.S. 462, 471 n.11 (1987). To the contrary, "[a]n official action" when "taken for the purpose of discriminating" on account of race "has *no legitimacy at all* under our Constitution." *Id.* (emphasis added) (quoting *City of Richmond v. United States*, 422 U.S. 358, 378 (1975)). Legislative apportionments violate the Fourteenth Amendment if "'conceived or operated as purposeful devices to further racial discrimination' by *minimizing*, cancelling out *or* diluting the voting strength of racial elements in the voting population." *Rogers*, 458 U.S. at 617 (emphasis added) (citation omitted).

To be sure, *absent* discriminatory purpose, a jurisdiction does not violate federal law simply by not drawing districts that would have increased a small minority group's voting strength. *Bartlett v. Strickland*, 556 U.S. 1, 14-20 (2009) (plurality opinion). But the limitation says nothing about

circumstances like those in the present case, in which a state *has* acted with a discriminatory purpose. To the contrary, Justice Kennedy's plurality opinion in *Bartlett* expressly stated that the *Gingles* precondition of showing that "the minority population in the potential election district is greater than 50 percent" simply "does not apply to cases in which there is intentional discrimination against a racial minority." *Id.* at 20.

2. The *Bartlett* plurality's reliance on *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *see Bartlett*, 556 U.S. at 20, supports the following proposition: When there has been a showing of intentional discrimination, liability under the Fourteenth Amendment or Section 2 is established whenever the challenged district makes it harder for the minority community to participate effectively in the political process.

In this case, the district court found that the challenged districts had exactly that effect.

Start with Nueces County. Because much of the Latino population there was deliberately "packed" into one district to buttress the prospects of an Anglo legislator in another district, those Latinos left behind in the overwhelmingly Anglo district were "marginalized." M.D.A. App. 102a. Similarly, in Bell County, the Legislature's decision to split Killeen minimized the voting strength of a multi-minority coalition. H.J.S. App. 19a-22a. And in Dallas County, the district court found that the Legislature had "unnecessarily plac[ed] Latinos in HD103 and HD104 while simultaneously making HD105 more Anglo in order to protect the Anglo" incumbent and to minimize Latino political power. *See id.* 172a.

Given the adverse consequences for those counties' minority citizens, the district court correctly held that appellees had proved a violation of Section 2 and the Fourteenth Amendment. What the remedy should be can be determined on remand.[14]

III. The configuration of the districts in Nueces County violates Section 2's "results" test.

In addition to holding that the configuration of HD32 and HD34 violated federal law because the Legislature's adoption of those districts was the product of intentional racial discrimination, the district court held that the configuration violated Section 2's "results" test "insofar as two compact HCVAP-majority opportunity districts could be drawn within Nueces County." H.J.S. App. 85a. This Court need not address that alternative holding if, as appellees have urged, it affirms the district court's findings with regard to appellees' intentional discrimination-based claims. But if the Court does reach that holding, it should affirm.

Contrary to the State's assertion, Texas Br. 65, the district court did *not* conclude that it was impossible to draw two minority opportunity districts within Nueces County. While there was some uncertainty over how well Latino voters would fare if the Section 2 remedy involved doing nothing beyond reconfiguring the two districts wholly within Nueces County, *see* H.J.S. App. 50a, 58a-59a, the court found that a Latino voting population that "continues to climb" would over

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[14] The fact that the remedy for the State's intentional discrimination has not yet been adjudicated reinforces the conclusion that this Court lacks jurisdiction over the State's premature appeal. *See supra* pages 29-34.

time give Latino voters "a significant advantage in house district elections" in both districts; indeed, "they could easily control elections." *Id.* 55a, 57a-58a. Thus, after extensive discussion, the court explained that while two such districts might not offer "the best configuration for minority success," *id.* 59a, they would arguably provide an "opportunity to win elections," *see id.* 56a (emphasis omitted).

Texas's claim that the district court "recognized" that a second majority-Latino district in Nueces County would produce an "over-representation" of Latino voters in the county, Texas Br. 67 (quoting H.J.S. App. 51a), rips a phrase out of context. The district court's remark came in the course of pointing out, as part of its totality-of-the-circumstances analysis, that making both districts in Nueces County majority-Latino should *not* undermine finding a Section 2 violation, given that even with two majority-Latino districts in Nueces County, Latinos "statewide would still be under-represented." H.J.S. App. 51a.

Texas has not challenged the district court's findings regarding the demographics of past, present, and potential districts within Nueces County. Nor has it challenged the district court's findings regarding racial polarization and socioeconomic disparities affecting Latino political participation within the county. Given that appellees have satisfied all the *Gingles* preconditions, *see supra* pages 7-8—and in light of the fact that the district court has not yet decided whether it will require a remedy that creates two majority-Latino districts within Nueces County, H.J.S. App. 60a-61a—this Court should affirm the district court's ruling with respect to the Section 2 results claim against HD32 and HD34.

IV. HD90 in Tarrant County is an unconstitutional racial gerrymander.

Under *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny, an electoral district violates the equal protection clause when: "(1) race is the 'dominant and controlling' or 'predominant' consideration in deciding 'to place a significant number of voters within or without a particular district," and (2) "the use of race is not 'narrowly tailored to serve a compelling state interest.'" *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1264 (2015) (first quoting *Miller v. Johnson*, 515 U.S. 900, 913, 916 (1995), and then quoting *Shaw v. Hunt*, 517 U.S. 899, 902 (1996)).

Texas does not contest the district court's finding that race was the predominant factor "motivating the decision of which individuals to place within and without HD90" when its boundaries were reconfigured by the Legislature in 2013, H.J.S. App. 77a. The district court, which observed the witnesses' testimony, deemed the explanation for the HD90's boundaries given by the legislator and staff member who drew it "as naked a confession as there can be to moving voters into and out of districts purely on the basis of race." *Id.* 81a. Thus, the district properly subjected HD90 to strict scrutiny.

Texas's sole defense is that the State was entitled to engage in this deliberate racial gerrymander in order to comply with a Voting Rights Act mandate to "maintain[] HD90 as a majority-Hispanic district." Texas Br. 69. That defense is meritless. The 2013 changes made to HD90 involved neither a genuine compelling government interest nor narrow tailoring. And because "HD90 actually was redrawn by the 2013 Legislature," *id.* at 34, it undermines the State's

refrain that in 2013, the State "enacted a House plan that made only minor changes" to the legislatively drawn districts that had been left intact under the district court's 2012 interim remedy, *id.* at 26.

1. When strict scrutiny applies, as it does here, the question is whether the government's "actual purpose[]" in relying on a suspect classification is a compelling one, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989)—not whether the government can proffer an "hypothesized or invented *post hoc*" justification "in response to litigation," *United States v. Virginia*, 518 U.S. 515, 533 (1996). Here, the district court concluded that the real motivation for the 2013 reconfiguration of HD90 had nothing to do with ensuring compliance with the Voting Rights Act. H.J.S. App. 81a-83a. As appellees have already explained, *see supra* pages 41-43, in reviewing that factual finding, this Court must "give singular deference" to the trial court's credibility determinations. *Cooper v. Harris*, 137 S. Ct. 1455, 1476 (2017). That deference is warranted here. In addition, the record more than supports the district court's findings.

To begin, HD90 as configured in 2011 was majority-Latino in HCVAP using 2008-2010 ACS data, and majority SSVR. M.D.A. App. 266a. The Texas Attorney General urged the Legislature to retain that configuration as part of the 2013 apportionment legislation. *See* H.J.S. App. 440a. Thus, rather than suggesting that the Voting Rights Act required the use of race to redraw HD90's boundaries, the State's chief lawyer recommended retaining the existing boundaries. Had the Legislature followed that advice—as it did with respect to essentially all the

other districts that had not been altered by the 2012 interim remedy—HD90 would have remained a majority Hispanic district with no need to deliberately and surgically move voters into and out of the district based on their race. There would have been no *Shaw* claim.

As Texas acknowledges, the impetus for the 2013 boundary manipulations was the incumbent's desire to recapture a pocket of non-Latino supporters who had not been included within HD90 under the 2011 plan. Texas Br. 69-70. It was the discretionary decision to add this non-Latino population to the district that necessitated removing other non-Latino residents in order to retain the district's demographic character.

Discussion of redrawing HD90 to comply with the Voting Rights Act appears nowhere in the 2013 legislative record. On the state house floor, Representative Burnam, the amendment's author, stated only that the new boundaries for HD90 restored the Como precinct to HD90 and also moved Anglos out of HD90 and minority voters into HD90. *See* H.J.S. App. 80a-81a. At trial, Burnam testified that his staffer did not track election results while making changes to HD90 because "[i]t was purely a demographic exercise." Task Force M.D.A. App. 5a. The district court concluded, after reviewing all the evidence, that "no one considered the legal significance of the [demographic] target in terms of compliance with the VRA." H.J.S. App. 81a-82a.

In addition to the dearth of evidence showing that Texas considered the impact of its changes on Latino voters' opportunity to elect, the sequence of district configurations belies the State's claim that the deliberate focus on race was undertaken for Voting

Rights Act compliance. In the usual successful defense to a *Shaw* claim, a state shows that the Voting Rights Act requires use of race because the elements of a vote dilution claim are present. *See, e.g., Cooper*, 137 S. Ct. at 1470 ("If a state has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district."). Here, however, the State's changes to HD90 were not spurred by a desire to *create* a Latino opportunity district in compliance with the Voting Rights Act. HD90 was *already* a majority-Latino district before Burnam proposed redrawing it. That the redrawn district actually "decrease[d]" the share of Spanish-surnamed registered voters in the district, H.J.S. App. 73a, further gives the lie to the State's rationalizations: It is difficult to imagine how the Voting Rights Act would require predominant use of race to *lower* the electoral strength of Latinos in an existing Latino opportunity district.[15]

2. Nor, under the circumstances, was the use of race in modifying HD90 narrowly tailored to comply with the Voting Rights Act.

Even if the district court had found that Texas had a strong basis in evidence to conclude that the Voting

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[15] The Court should reject Texas's attempt to use an expression of concern about this decrease made by MALC's counsel as evidence that compliance with the Voting Rights Act motivated the Legislature's reliance on race. *See* Texas Br. 70. That concern was expressed in the context of an initial proposal by Burnam and Kenney to modify HD90 that would have reduced the number of Latino registered voters in HD90. J.A. 399a. That concern would never have needed to be expressed had the State maintained the 2011 configuration of HD90.

Rights Act required it to maintain the existing SSVR level in HD90, the narrowly tailored solution would have been to refrain from moving a heavily non-Latino precinct into HD90 and then splitting ten other precincts to move voters into and out of the district based on race.

The State's race-based redistricting of HD90 cannot survive strict scrutiny, regardless whether the Voting Rights Act required maintaining the district's existing SSVR, because it was eminently possible to meet that target without making predominant use of race. Texas had already met that goal in 2011.

CONCLUSION

For the foregoing reasons, this Court should dismiss for lack of jurisdiction or, alternatively, affirm the order of the district court.

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Nos. 17-586, 17-626

In the Supreme Court of the United States

GREG ABBOTT, ET AL., APPELLANTS,

v.

SHANNON PEREZ, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

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Plaintiffs' briefs are a study in revisionist history. Unable to explain how the Texas Legislature could have engaged in intentional racial discrimination by adopting maps imposed by the district court itself, plaintiffs insist that the actions of the 2013 Legislature are essentially irrelevant. They even characterize the 2013 Legislature's enactment of the court-ordered plans as "legislative inaction." That is nonsensical. The districts plaintiffs challenge are districts duly enacted by the 2013 Legislature. The intentions this Court must examine are therefore the intentions of the 2013 Legislature. And plaintiffs cannot blind the Court to the reality that the 2013 Legislature enacted the 2013 maps only after those maps received the imprimatur of a federal three-judge district court.

Plaintiffs protest that the district court did not draw the challenged districts in the first instance, and that its 2012 decisions imposing the interim maps were "preliminary." But that misses the point. Except for HD90, every district invalidated below was subject to pending claims in 2012. The district court was operating under a mandate to review those claims and impose maps "that do not violate the Constitution or the Voting Rights Act." *Perry v. Perez*, 565 U.S. 388, 396 (2012) (per curiam). And the district court assured the parties that it "obey[ed] [this] Court's directive" and remedied all "plausible legal defects" identified by plaintiffs' claims against the 2011 maps—as the district court was required to do for all claims that were merely "not insubstantial" under the lower VRA §5 standard set forth in this Court's *Perry* decision. H.J.S. App. 313a; *accord* C.J.S. App. 408a.

Accordingly, even accepting the fundamentally flawed notion that the 2013 Legislature was under some obligation to "remove" any "taint" of intentional discrimination from the court-ordered maps, the district court itself had already concluded that no such taint existed. The Legislature cannot plausibly be said to have engaged in intentional discrimination by taking the district court at its word—particularly given the strong "presumption of good faith" to which the Legislature's actions were entitled and the "extraordinary caution" courts must apply when confronting claims alleging an unlawful legislative purpose. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

That is all the more true given the context in which the district court's assurances came. By the time the court imposed its remedial maps in 2012, there had already been: (1) a two-week trial and multiple rounds of post-trial briefs in 2011, culminating in the first set of court-ordered remedial maps; (2) an appeal resulting in this Court's *Perry* opinion vacating those maps; and (3) post-remand hearings and additional briefing on pending claims—including briefing on claims in the parallel §5 proceedings before the D.C. district court.

If the district court truly believed that it lacked sufficient time to adequately address plaintiffs' claims before issuing remedial maps, it would have revisited those claims immediately after the 2012 elections. And if it believed the remedial maps incorporated any discriminatory "taint" that should have been apparent to the Legislature when it adopted the court-ordered districts in 2013, the district court could not have denied *two* motions

to enjoin the Legislature's 2013 plans, leaving them in place for four years and two election cycles while it adjudicated moot claims against the repealed 2011 plans. Those are hardly the actions of a court concerned that it may have violated this Court's mandate to impose maps "that do not violate the Constitution or the Voting Rights Act." *Perry*, 565 U.S. at 396.

Rather than point to any evidence that the Legislature enacted the court-imposed plans for a discriminatory purpose (because there is none), plaintiffs accuse the 2013 Legislature of having "rushed" the plans through. That is manifestly wrong: The Legislature in fact heard nearly 33 hours of debate over 11 public hearings, after which it held floor debates spanning over 1,000 pages in the House and Senate journals. But it is also beside the point. Plaintiffs' burden was to prove that the Legislature enacted those plans in a deliberate effort to sort voters on the basis of race or adversely affect minority voters. Even assuming (contrary to reality) that the Legislature *had* "rushed" the maps through, that would not begin to prove that the Legislature enacted court-imposed remedial districts for an illicit purpose.

Moreover, plaintiffs do not dispute that it is not possible to draw additional performing majority-minority districts, as defined in *Bartlett v. Strickland*, 556 U.S. 1, 15 (2009) (plurality op.), in either the congressional or state-house plans—even though nine groups of plaintiffs and multiple experts spent more than six years trying to do so. That shows that plaintiffs' case is not about legal defects in the State's maps or the makeup of the State's

legislative delegations; it is about plaintiffs' desire to reimpose preclearance on the State of Texas after *Shelby County v. Holder*, 570 U.S. 529 (2013).

In the end, then, plaintiffs are forced to spend most of their time complaining about the motivations of the *2011* Legislature. Those complaints are unfounded, as the district court correctly concluded in 2012 and Judge Smith's dissent rightly recognized in 2017. But they are ultimately irrelevant, as this case is about the actions of the 2013 Legislature, and plaintiffs did not come close to meeting their burden of proving an unlawful purpose—with or without the strong presumption of good faith to which those actions are entitled.

I. This Court Has Jurisdiction To Review The District Court's Orders.

The three-judge district court issued orders on the eve of election deadlines that had the practical effect of blocking the State from using its existing redistricting plans for the 2018 elections. The orders did much more than merely invalidate districts in Plans C235 and H358. The court concluded that these purported violations "now require a remedy" and "must be remedied either by the Texas Legislature or this Court." C.J.S. App. 118a-119a; *see* H.J.S. App. 84a, 86a. And it gave the Governor just three days to call a special session or, failing that, ordered defendants to participate in expedited judicial redistricting. There can be no serious dispute that if the State had responded by declining to redistrict and notifying the court that it would still use the existing plans in the 2018 elections, defendants would have been held in contempt. Tellingly, plaintiffs do not even try to

claim there was any prospect that the State could still use Plans C235 or H358 in the 2018 elections. That should be the end of the matter, as it is plain that the district court prohibited the State from using its maps in further elections.

Plaintiffs nonetheless insist that this Court lacks jurisdiction under the "plain language" of 28 U.S.C. §1253 because the district court did not label its order an "injunction." H.Br.29.[1] In other words, they insist that §1253 imposes a magic-words test. That is the only way to understand their contention (H.Br.29, 30-31) that this Court lacks jurisdiction here despite having jurisdiction in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), and *Gill v. Whitford*, No. 16-1161 (U.S.)—cases where district courts also invalidated districts and ordered the States to pass new plans, but had not yet imposed remedial plans when the States appealed. But this Court has already rejected a magic-words test in *Carson v. American Brands, Inc.*, holding that appellate jurisdiction turns on the "practical effect" of a court's order—not its label or its precise "terms." 450 U.S. 79, 83-84 (1981).

Plaintiffs try to limit *Carson* to 28 U.S.C. §1292(a)(1) appeals, H.Br.30, but nothing in the text of 28 U.S.C. §§1253 or 1292 could justify a functional approach for one and a magic-words test for the other. Section 1292(a)(1)

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[1] The abbreviation "Br." refers to the Brief for Appellants; "U.S.Br." refers to the Brief for the United States as Appellee in Support of Appellants; "C.Br." refers to the Brief for Appellees (Congressional Districts); and "H.Br." refers to the Brief for Appellees Other than the United States (State House Districts).

vests courts with jurisdiction over "[i]nterlocutory orders ... granting ... injunctions," and §1253 vests this Court with jurisdiction over "an order granting ... an interlocutory ... injunction." The fact that §1292(a)(1) does not apply "where a direct review may be had in the Supreme Court" is relevant only to determining the source of this Court's jurisdiction—not to determining what qualifies as an "injunction." Nor does it make any difference that §1253 is interpreted narrowly. H.Br.29-30. *Carson* acknowledged that §1292 is interpreted "narrowly" too, yet that did not stop the Court from holding that an order is appealable under §1292 if it has the "practical effect" of an injunction. 450 U.S. at 84.

This Court's decision in *Gunn v. University Committed to End the War in Viet Nam*, 399 U.S. 383 (1970), does not help plaintiffs either. In *Gunn*, the district court *stayed* its order finding a First Amendment overbreadth violation, then "entered no further order of any kind." *Id.* at 387. Moreover, the initial order was wholly unclear as to what "was to be enjoined" and "against whom" any order would run, leading appellants themselves to concede that it was really an "advisory opinion." *Id.* at 388, 389. Here, by contrast, there is no doubt about the who, what, or when: The district court ordered the State *immediately* to engage in expedited redistricting, and expressly refused to stay its order "pending the next session" of the Texas Legislature, as the court in *Gunn* had done.

Id. at 386. The district court thus placed the State in precisely the same situation as the States in *Gill* and *Cooper*, where this Court exercised appellate jurisdiction.[2]

Plaintiffs assert that the State's position "transforms every declaration of a violation into a *de facto* injunction." H.Br.33. Far from it. Declaratory relief, by itself, is insufficient to invoke this Court's appellate jurisdiction. *Mitchell v. Donovan*, 398 U.S. 427, 430-31 (1970) (per curiam). But where an order goes beyond declaring rights and compels the State to engage in immediate redistricting on the eve of election deadlines, there is no escaping the conclusion that the State has been enjoined from using its existing map. This Court's jurisdiction is just as clear here as it was in *Cooper* and *Gill*.

II. The Legislature Did Not Engage In Intentional Discrimination When It Enacted Districts Imposed By The District Court Itself.

The district court reached the remarkable conclusion that the Texas Legislature engaged in intentional discrimination when it adopted as its own the same districts that the court itself ordered the State to use in the 2012 elections. Try as they do, plaintiffs cannot justify that unprecedented and untenable result. Plaintiffs attempt to recharacterize the district court's decision as resting solely on factual findings about the Legislature's intent,

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[2] *Whitcomb v. Chavis*, 403 U.S. 914 (1971), is also consistent with exercising jurisdiction, as it was an unexplained order dismissing for lack of jurisdiction where expedited redistricting had not been ordered. *See* U.S.Br.23.

in hopes of cloaking it in clear-error review. But the district court did not make any finding that the Legislature acted with improper intent in 2013—because the court's fatally flawed "remove the taint" theory obviated the need to do so. Nor could the court have made any such finding, as plaintiffs' paltry evidence does not come close to establishing intentional discrimination, let alone overcoming the strong presumption that the Legislature's decision to enact the court's own maps was a good-faith effort to comply with the Constitution and the VRA and bring this already-protracted litigation to an end.

A. The District Court's Intentional Discrimination Analysis Rests on a Fatally Flawed Legal Standard.

Plaintiffs' efforts to defend the district court's intentional-discrimination holding as a factual finding entitled to clear-error review, H.Br.41-43; C.Br.1, 40, fail at the threshold. The district court never found that the 2013 Legislature enacted Plan C235 or H358 for an unconstitutional purpose—that is, in a deliberate effort to [illegible]rt voters on the basis of race, *Miller*, 515 U.S. at 916-17, or "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Instead, the court faulted the State for failing to prove that the Legislature "remove[d]" the purported "discriminatory taint" from the court-imposed plans before adopting them as its own. C.J.S. App. 46a.

That reasoning is wrong at every turn. First, it eviscerates both the strong "presumption of good faith" to

which legislative enactments are entitled and the "extraordinary caution" courts must employ when confronting unlawful-purpose claims. *Miller*, 515 U.S. at 916. If anything, the "normal presumption of good faith" should have been "heightened by the State's acceptance of the judicial plan." U.S.Br.30. Instead, the district court not only ignored the presumption, but reversed it, demanding that defendants prove that the maps were *not* "tainted" with "discriminatory intent."

For the most part, plaintiffs ignore the presumption of good faith as well. One of their briefs never even mentions it, while the other contends that it does not apply because the districts imposed by the court in 2012 were "entirely a product of lines drawn by the Legislature" in 2011. H.Br.36-37. That is wrong as a factual matter, *infra* pp.12-14, but it is also beside the point. While the United States is undoubtedly correct that the presumption applies with particular force given that the Legislature enacted court-imposed maps, the presumption is fully applicable even on the assumption that those maps were "legislatively drawn." H.Br.27. After all, the whole point of the presumption is to give the benefit of the doubt to "legislative enactments," *Miller*, 515 U.S. at 916, which the 2013 maps undoubtedly were. The presumption of good faith did not disappear just because an *earlier* legislature enacted *different* maps with purportedly discriminatory intent.

Hunter v. Underwood, 471 U.S. 222 (1985), does not suggest otherwise. "*Hunter* did not involve a subsequent legislative enactment at all," U.S.Br.33, let alone a subsequent legislative enactment codifying a judicial order.

There, the legislature merely sat on its hands while the courts struck down various provisions of a law admittedly passed with discriminatory intent, U.S.Br.30-31, and this Court expressly *reserved* judgment on whether the same law "would be valid if enacted today without any impermissible motivation." 471 U.S. at 233. Here, the Texas Legislature adopted different plans that the district court concluded remedied any "plausible" legal defects in the 2011 plans. H.J.S. App. 313a.

Relying on Justice Thomas's concurrence in *United States v. Fordice*, 505 U.S. 717, 746-47 (1992), plaintiffs also suggest that the presumption is not warranted where there is a history of discrimination. H.Br.46-47. But *Fordice* involved policies continued from a "*de jure* system" of racial segregation in public schools—and even then, the Court still required ongoing "discriminatory effects" to prove liability. 505 U.S. at 745 (Thomas, J., concurring) (quoting *id.* at 729 (majority op.)). As Justice Thomas's concurrence made clear, the Court considered "the historical background of the policy, the degree of its adverse impact, and the plausibility of any justification asserted in its defense," but it did "not formulate [its] standard in terms of a burden shift with respect to intent." *Id.* at 747.

Of course, the bare act of reenactment cannot "save" otherwise invalid legislation "from invalidity," C.Br.31 n.17, or "insulate" districts "from further challenge, regardless of their legal infirmities," H.Br.20. Reenactment has no bearing on claims of discriminatory *effects*, and it does not definitively answer the question of dis-

criminatory *intent*. Reenactment does, however, fundamentally alter the object of the intent analysis, which is the intent of the legislature that enacted the challenged law. And while a court need not blind itself to the history behind a law's enactment in assessing that intent, the new legislation does not lose its presumption of good faith just because a previous legislature enacted the same law with an allegedly illicit purpose. *See* U.S.Br.28-30.

Regardless, whatever questions may arise when a legislature enacts the *same* law but "manufacture[s] new legislative records," C.Br.28, that is manifestly not what happened here. Far from reenacting the 2011 maps, the 2013 Legislature repealed them and replaced them with maps imposed by the district court itself, which changed 9 congressional and 28 state-house districts. To be sure, those maps retained some aspects of the 2011 plans, but it is neither unusual nor legally suspect for a new law to retain aspects of its predecessor, and that certainly does not convert separate districting legislation into "legislative inaction." C.Br.27-28. Accordingly, the 2013 plans were entitled to the same presumption of good faith as any other districting plans, and could be invalidated only if plaintiffs satisfied their heavy burden of proving that the legislature enacted the court-imposed maps in a deliberate effort to sort voters on the basis of race, *Miller*, 515 U.S. at 916, or "because of" some unlawful "adverse effects" on minority voters, *Feeney*, 442 U.S. at 279.

Plaintiffs cannot short-circuit that analysis by complaining about the motivations of a different legislature in enacting a different law.[3]

B. There Is No Evidence that the 2013 Legislature Engaged in Intentional Discrimination.

Unable to defend the district court's legal reasoning, plaintiffs resort to distorting the record. But their efforts do not bring them any closer to meeting their heavy burden of proving that the Legislature engaged in intentional discrimination.

1. Plaintiffs first try to avoid the presumption of good faith by insisting that the court-imposed plans were not really "the *court*'s" because they retained some districts from the 2011 plans. H.Br.36 (emphasis added). That argument misses the point. Defendants have never claimed that everything in the court-ordered maps was "the court's idea." H.Br.37. There is no dispute that the court retained some districts from the 2011 maps. But that is not an accident, or the product of some hoodwinking by defendants. It is a direct and intended consequence of this Court's decision in *Perry*, which specifically instructed the district court to "take care not to incorporate into the interim plan any legal defects in the state plan," but to *preserve* districts that were *not* subject to "not insubstantial" §5 claims or to constitutional or VRA

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[3] Indeed, plaintiffs previously insisted on separate trials for the 2011 and 2013 plans because "the state actors responsible for creating the 2011 and 2013 redistricting plans are different." Plaintiffs' Advisory in Support of Proposed Scheduling Order at 4 (Oct. 9, 2013), ECF No. 921.

§2 challenges that were "likely to succeed on the merits." 565 U.S. at 394.

And that is precisely what the district court did. It ordered the State to use the 2012 maps only after carefully reviewing all pending claims against the 2011 maps and concluding that every "plausible" legal defect had been remedied. H.J.S. App. 313a. Plaintiffs claim that the Legislature was not entitled to rely on the district court's orders because they were "preliminary." H.Br.37. But the district court assured the parties that it "obey[ed] [this] Court's directive by adhering to the State's enacted plan except in the discrete areas in which we have preliminarily found plausible legal defects under the standards of review the Court has announced." H.J.S. App. 313a. Preliminary or not, the Legislature was certainly entitled to take the district court at its word that it had complied with this Court's mandate "to draw interim maps that do not violate the Constitution or the Voting Rights Act." *Perry*, 565 U.S. at 396.

Plaintiffs' claim that the district court's 2012 orders "did nothing more than decline to enter a preliminary injunction" against the unprecleared 2011 plans is demonstrably false. H.Br.28. The district court had already entered a preliminary injunction against those plans in 2011. J.A. 17a. In 2012, the court affirmatively ordered the State to conduct its upcoming elections under plans that had been reviewed, approved, and substantially modified, with changes to 9 congressional and 28 statehouse districts. C.J.S. App. 423a ("This Court has independently reviewed Plan C235 . . . ."); H.J.S. App. 315a (referring to "this Court's independently drawn Plan

H309"). The court did so, moreover, after having conducted two weeks of trial, held several days of hearings, and received hundreds of pages of briefing on plaintiffs' claims—including additional briefing and hearings following this Court's remand. J.A. 4a-20a; C.J.S. App. 380a. That is a world apart from cases where parties "relied on a short stipulation of facts" and underdeveloped legal theories, *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 398 (1981), and where the district court was "disconcerted by the hurried character of the proceeding" that occurred the day after the preliminary injunction motion was filed, *Sole v. Wyner*, 551 U.S. 74, 79 (2007).

In short, the notion that the district court in 2012 "simply 'defer[red]'" to the preferences of the Legislature, H.Br.19, strains credulity. The court imposed the 2012 maps only after careful consideration of the very same challenges pressed here, and with the express assurance that they addressed all "plausible legal defects" in the 2011 plans. H.J.S. App. 313a. The Legislature did not engage in intentional discrimination by taking the district court at its word.

2. Plaintiffs next insist that "the Legislature did not actually believe that 'passing the interim maps would end the litigation.'" H.Br.43. If they mean that the Legislature knew plaintiffs would continue to fight them no matter what maps they passed, then they are certainly correct. The Legislature did, however, have an eminently good-faith basis to believe that *the district court* would not invalidate the maps that it had just ordered the State to use. Plaintiffs cite no evidence for their charge that the 2013 Legislature enacted districts *because* they were

allegedly "drawn in 2011 for discriminatory reasons." H.Br.45.[4] And there is nothing remotely constitutionally suspect about adopting new maps because they are more likely than the previous maps to satisfy the Constitution and VRA. After all, it would be a strange doctrine indeed that viewed with suspicion efforts by subsequent legislatures to remedy the perceived missteps of their predecessors.

Plaintiffs protest that the 2013 redistricting plans were adopted too "'quickly,' with no real discussion of district configurations." H.Br.43. Nonsense. The redistricting legislation was under consideration for 22 days—almost the entire 30-day special session. Br. Stat. App. 34a, 36a; Tex. Const. art. III, §40. The House and Senate committees held more than 30 hours of public hearings in multiple cities, resulting in more than 1,300 transcript pages. *See* 2017 JX-10-15, 20-24. And the separate floor debate accounted for more than 1,000 pages in the Texas House and Senate Journals. *See* 2017 JX-17-18; 2017 JX-26-27. The Legislature adopted multiple amendments to Plan H309, and it considered several amendments to Plan C235, most of which were rejected on bipartisan votes in the Senate Redistricting Committee. *See* 2017 JX-24.4.

Plaintiffs charge the Legislature with "[w]illfully ignor[ing] those who pointed out deficiencies" in the court-ordered plans. C.Br.21 (citing C.J.S. App. 45a n.45). But

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[4] As for supposed "self-contradictory statements" by "legislative leaders," H.Br.43, the cited footnote (H.J.S. App. 358a n.45) does not identify any such statement.

neither the district court nor plaintiffs identified a single "deficiency" that was "pointed out" to the Legislature but ignored.[5] Jeff Archer, an attorney at the Texas Legislative Council, did not identify any "deficiency" in the court-ordered plans. Instead, his cited testimony consists only of general statements about the procedural posture in which those orders were issued. *See* U.S.Br.42. Notably, Archer specifically declined to discuss the "validity" or "legal ramifications" of any proposed alternative plan. *See* 2017 JX-14.4 at 7. Plaintiffs' counsel MALDEF, by contrast, informed the Legislature that these remedial plans addressed every defect identified by the D.C. district court under VRA §5. C.J.S. App. 436a-439a.

Plaintiffs also argue that the "legislative findings regarding the 2013 [state-house] plan were in fact produced ahead of time by the Texas Attorney General." H.Br.43. But the Attorney General's advice to the Legislature to make its legislative findings part of the statutory text says nothing about the Legislature's purpose. And there is no evidence that the Legislature did not believe those findings—let alone that it did not believe the

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[5] Nor was there any "'steadfast refusal' to consider creating additional minority opportunity districts." H.Br.20. Plaintiffs are really complaining about the Legislature's decision not to create additional crossover or coalition districts, which, as plaintiffs' congressional brief concedes (C.Br.4 n.2), are not the same thing as "minority opportunity districts." The failure to adopt crossover or coalition districts cannot support a finding of intentional discrimination, as VRA §2 does not require either one. *See Bartlett*, 556 U.S. at 15.

district court's express assurance that it followed this Court's directives. *See* C.J.S. App. 423a; H.J.S. App. 313a.

Rather than engage the legislative history, plaintiffs distort the timeline to create a false impression that the 2013 Legislature reenacted districts *after* the district court had already found them "tainted" by intentional discrimination. In Bell County, for example, where the Legislature did not change the district boundaries in 2013, plaintiffs assert that "[t]he court had earlier found that in configuring the Bell County districts, Representative Aycock had deliberately 'divided the growing minority City of Killeen to protect his incumbency.'" H.Br.22 (citing H.J.S. Supp. App. 289a). In fact, the district court reached that conclusion nearly four years *later*, in its 2017 advisory opinion on the 2011 maps. The 2013 Legislature obviously could not have "intended to continue the intentional discrimination found in Plan H283," H.Br.22 (quoting H.J.S. App. 22a), when there was no such "finding" until 2017.

3. Finally, plaintiffs' post-hoc efforts to undermine the conclusions the district court reached in 2012 are entirely unfounded, and provide no basis to question the Legislature's good faith in relying on the district court's express assurance that it followed this Court's mandate to impose maps that complied with the Constitution and the VRA.

First, plaintiffs' allegation that the court was not aware in 2012 that "it was possible to draw two majority

HCVAP districts" in Nueces County, H.Br.38, is irrelevant. Mapdrawers relied on Spanish-surname-voter-registration data when drawing House districts in 2011 because citizen-voting-age-population data were not available until late April. H.J.S. App. 129a. There is no evidence that they deliberately refused to consider HCVAP data. In any case, Texas Legislative Council attorneys correctly advised that two *performing* Hispanic-opportunity districts could not be drawn in Nueces County. H.J.S. Supp. App. 93a. The Legislature's decision not to divide Nueces County in a way that would have *diluted* Hispanic voting strength is not evidence of intentional discrimination.

Second, Representative Aycock's testimony at retrial in 2014, H.Br.38, does not support a conclusion of intentional discrimination or racial predominance in HD54. He merely testified that he attempted to create a Republican district by adding areas that supported Republicans. Br.54-56. Drawing a Republican district is not racial discrimination, "even if it so happens that the most loyal Democrats happen to be [minorities] and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999). In any event, the district court correctly rejected the only claims that plaintiffs actually brought in Bell County. *Infra* pp.26-27.

Third, plaintiffs' claim that the court had not "heard from the architect of the challenged districts in western Dallas County" in 2012 is simply wrong. H.Br.38. That individual (Ryan Downton) gave extensive live testimony

in 2011, *see* 2011 Tr. 903-1023, which the district court cited in its 2012 opinion. C.J.S. App. 411a, 414a, 422a.

* * *

At bottom, neither the record nor common sense supports the district court's implausible conclusion that the Legislature engaged in intentional discrimination when it embraced court-imposed districts as its own. Plaintiffs do not even try to explain how the very same districts could be lawful when imposed by the district court, but "tainted" with discriminatory intent when later enacted by the Legislature.

III. There Never Was Any Vote Dilution Or Racial Gerrymandering To Begin With In The Districts Imposed By The District Court In 2012.

By the time the district court held a second trial on claims against the 2011 maps, those maps had been repealed, rendering any dispute about the motivations underlying them moot—a proposition that plaintiffs barely even bother to contest. That said, the district court's "remove the taint" theory fails on its own terms because there never was any "taint" to "remove" in the first place.[6]

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[6] To the extent the district court found intentional discrimination based on one-person, one-vote violations (*see* Br.56-58, 62-63), plaintiffs have waived those arguments by choosing not to defend them on appeal.

A. There Was No Vote Dilution in Districts Imposed by the District Court in 2012.

1. Intentional-vote-dilution claims require proof of an actual vote-dilution effect.

At the outset, all of the district court's intentional-vote-dilution findings were infected by its erroneous conclusion that intention-vote-dilution claims do not require proof of vote dilution. Intentional-vote-dilution claims require proof of both intent to dilute minority voting strength *and actual* dilution of minority voting strength. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (explaining that districts "violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength"). Those requirements do not change just because a plaintiff alleges that vote dilution was "intentional."

Plaintiffs cannot escape that conclusion by asserting a constitutional rather than a VRA claim, because the Constitution no more recognizes an intentional-vote-dilution claim without vote dilution than the VRA does. To the contrary, the constitutional test for vote dilution is *more* demanding than the VRA test, as it requires both discriminatory effects *and* discriminatory intent. *See, e.g.*, *City of Mobile v. Bolden*, 446 U.S. 55, 66-68 (1980) (plurality op.). As *Gingles* explained, VRA §2 "was designed to restore the 'results test'—the legal standard that governed voting discrimination cases prior to [this Court's] decision in *Mobile*," under which discriminatory effects alone were enough to establish a constitutional violation. *Thornburg v. Gingles*, 478 U.S. 30, 44 n.8 (1986).

Accordingly, while the Constitution demands discriminatory intent *and* discriminatory effects after *Mobile*, VRA §2 now requires only the latter. But plaintiffs do not and cannot cite precedent holding that the Constitution requires only the former.

Instead, plaintiffs rely principally on cases involving VRA §5. *See* H.Br.48.[7] But those cases are readily distinguishable, as that statute requires the State to prove that its voting laws do not have *either* a discriminatory purpose *or* a discriminatory effect. *See City of Pleasant Grove v. United States*, 479 U.S. 462, 471 (1987); *City of Richmond v. United States*, 422 U.S. 358, 378 (1975). This Court has expressly refused, however, "to equate a § 2 vote dilution inquiry with the § 5 retrogression standard." *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003). And it has certainly never equated the §5 standard with the Equal Protection Clause, which requires plaintiffs to prove both discriminatory intent and discriminatory effects.

To the extent cases suggest, in dicta, that a law with a race-based purpose "has no legitimacy at all under our Constitution," *see Pleasant Grove*, 479 U.S. at 471 n.11, this Court's modern precedents recognize that as a racial-gerrymandering claim. For example, *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cited in Bartlett*, 556 U.S. at 20, was decided before this Court recognized racial-gerrymandering claims in 1993 in

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[7] Plaintiffs also cite *Rogers v. Lodge*, 458 U.S. 613 (1982), H.Br.48, but that case involved actual vote-dilution effect. *See* 458 U.S. at 623-27.

Shaw, 509 U.S. at 649. Under the Court's current doctrine, the appropriate claim in *Garza* would be racial gerrymandering, because the county redistricted "with the intent to fragment the Hispanic population" among various districts—even though no vote dilution actually occurred. 918 F.2d at 770.

To establish an intentional-vote-dilution claim, then, plaintiffs must establish both that the Legislature intended to dilute minority voting strength *and* that the Legislature succeeded in doing so. And to establish the latter, plaintiffs must prove that it was possible to draw an additional performing majority-minority district. *See, e.g.*, *Bartlett*, 556 U.S. at 15; *LULAC v. Perry*, 548 U.S. 399, 430 (2006). As plaintiffs' congressional brief correctly recognizes, "[a] minority opportunity district under §2 is one in which minority voters [1] comprise a majority of eligible voters and [2] have a reasonable opportunity to elect candidates of their choice." C.Br.4 n.2. Accordingly, plaintiffs cannot establish vote dilution by faulting the Legislature for declining to draw a coalition district. *But see* H.Br.49 (alleging intentional vote dilution in Bell County because the "legislature's decision to split Killeen minimized the voting strength of a multi-minority coalition"). This Court has recognized that VRA §2 does not require States to draw coalition districts. *See Perry*, 565 U.S. at 398 (citing *Bartlett*, 556 U.S. at 13-15). And with good reason, as requiring coalition districts would only inject further considerations of race into redistricting. *Bartlett*, 556 U.S. at 21-22.

Plaintiffs nonetheless persist in urging a much broader conception of vote dilution, insisting that it exists "whenever the challenged district makes it harder for the minority community to participate effectively in the political process." H.Br.49. That attempt to replace the long-settled definition of vote dilution with an undefined "discernible discriminatory effect" standard, H.Br.28, smacks of an effort to resuscitate the VRA §5 retrogression standard, which considers "the diminution of a minority group's effective exercise of the electoral franchise." *Ashcroft*, 539 U.S. at 479. But this Court has expressly refused to export that standard to the VRA §2 or Equal Protection Clause contexts.

In sum, a challenged apportionment scheme either results in dilution of minority voting strength or it does not. Alleging intentional vote dilution adds the element of discriminatory intent, but it does not change the requirement to prove that vote dilution actually occurred. The district court's contrary belief fatally infected all of its intentional-vote-dilution findings on the 2013 plans.

2. There was no discriminatory intent or effect in CD27.

Under a correct understanding of the law, plaintiffs did not and could not prove intentional vote dilution in CD27.[8] The district court sustained plaintiffs' claim on

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[8] The district court "did not base its holdings . . . on a § 2 effects claim" in CD27. C.J.S. App. 113a-114a; *id.* at 113a n.85 ("If . . . there was no evidence of improper intent, this would be a different case . . . ."). Regardless, there was no vote-dilution effect in CD27. Br.48-51.

the theory that intent alone was enough. C.J.S. App. 112a-114a & n.85; *cf.* U.S.Br.16-17. In fact, the court expressly found that CD27 does "not diminish Hispanic voter opportunity for § 2 effects purposes" because "no additional compact Latino opportunity district could be drawn" in the region—a finding plaintiffs do not challenge. C.J.S. App. 113a; *see* C.Br.51. That should be the end of the matter, as a vote-dilution claim cannot survive without proof of vote dilution. *See supra* Part III.A.1. Plaintiffs nonetheless argue that their §2 rights were violated because certain Hispanic voters in CD27 could have been included in an existing majority-minority district elsewhere (CD34, anchored in Cameron County). But that is not a viable theory of vote *dilution* under §2 or the Constitution (or even a §5 retrogression problem, as the D.C. district court rightly concluded, *Texas v. United States*, 887 F. Supp. 2d 133, 153 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013) (mem.)).

At any rate, there was no intentional discrimination in CD27 to begin with. The 2011 Legislature's decision to move Nueces County to a separate district from Cameron County had nothing to do with Hispanic voters in Nueces County or with Travis County or CD35. The decision was instead made at the request of citizens and legislators in both Nueces and Cameron Counties, Br.51-52—and was made at the beginning of the 2011 redistricting process, before the Legislature had even received census data. Aug. 2014 Tr. 1761-62, 1772-73. Plaintiffs refuse to respond to that evidence, C.Br.45, and they do not identify any contrary evidence, or even any supposed "inconsistencies" in the record, C.Br.47. That is

because there simply is no evidence that the Legislature acted, in 2011 or 2013, for the purpose of discriminating against Hispanic citizens in Nueces County.

Purporting to rely on *Feeney*, 442 U.S. at 279, plaintiffs argue that discriminatory purpose can be inferred from the Legislature's mere knowledge that its redistricting would have "adverse consequences ... on an identifiable group—here, minority voters." C.Br.47 n.25. As an initial matter, there were no unlawful adverse consequences because there was no vote dilution. Regardless, that radical argument conflicts directly with *Feeney*, which admonished that "'[d]iscriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences." *Feeney*, 442 U.S. at 279. This is especially true in the redistricting context, where "the legislature always is *aware* of race." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quoting *Shaw*, 509 U.S. at 646). Thus, this Court cited *Feeney* when it made clear that partisan redistricting does not become racial gerrymandering "even if it so happens that the most loyal Democrats happen to be [minorities] and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. at 551.

With no other leg to stand on, plaintiffs contend that this case "obvious[ly] parallels" *LULAC*, asserting that the 2011 Legislature impermissibly "engineered a trade that took §2 rights from those who have them to provide a §2 remedy to those who do not." C.Br.51-52. This theory has no basis in evidence. The State has never argued that CD35 "offset" CD27. *Cf. LULAC*, 548 U.S. at 429. Regardless, the Legislature could not "take" §2 rights

from Hispanic voters in Nueces County because those voters do not have a VRA §2 right to be placed in a majority-minority district, as it is impossible to draw another majority-minority district in the area. *See* C.J.S. App. 114a, 127a-131a, 421a. That readily distinguishes this case from *LULAC*, where the State *could* have drawn another majority-minority district in the relevant area, but opted not to do so. *LULAC*, 548 U.S. at 429. Accordingly, the fact that CD35 is a majority-minority district is simply irrelevant to plaintiffs' unfounded challenge to CD27.

3. There was no discriminatory intent or effect in Bell County state-house districts.

Plaintiffs understandably have very little to say about the district court's incoherent conclusion regarding Bell County state-house districts. The district court correctly found no §2 results violation because it is undisputed that a "majority-minority CVAP" district cannot be drawn in Bell County. H.J.S. App. 18a, 180a. And it correctly found that the 2011 Legislature's "failure to create the proposed [coalition] districts was not intentional vote dilution." H.J.S. App. 18a.

Despite these findings, the district court perplexingly found "intentional discrimination/vote dilution." H.J.S. App. 22a. It purported to base that finding on "evidence that mapdrawers ... intentionally racially gerrymandered the district." H.J.S. App. 18a. But no plaintiff even asserted a racial-gerrymandering claim in Bell County, H.J.S. App. 192a-193a—and with good reason, as there is no evidence that race predominated in the creation of Bell County state-house districts. Having rejected

claims of intentional vote dilution and vote-dilution effect, and having recognized that plaintiffs did not bring racial-gerrymandering claims, the district court had no basis to find *any* violation in Bell County.

4. There was no discriminatory intent or effect in Dallas County state-house districts.

Plaintiffs do not dispute plaintiff MALC's expert's concession that it was not possible to create additional districts in Dallas County with an African-American or Hispanic citizen-voting-age-population majority.[9] Nor do they dispute that the 2011 Legislature designed HD105 to pair two Republican incumbents. The district court correctly rejected plaintiffs' claims that the 2011 Legislature engaged in vote dilution by failing to create *coalition* districts. H.J.S. App. 26a. And plaintiffs did not bring racial-gerrymandering claims in Dallas County. H.J.S. App. 192a-193a. The district court thus had no basis to hold that the 2011 Legislature, let alone the 2013 Legislature, engaged in either intentional vote dilution or racial gerrymandering.

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[9] Plaintiffs' claim that under the 2011 plan, "Anglos controlled nearly 60% of Dallas County's house seats with only one-third of its population," H.Br.12, is misleading because it relies on *total* population rather than *voting-eligible* population. The district court recognized that of approximately 900,000 Hispanic residents of Dallas County, "only 256,195 were Hispanic citizens of voting age." H.J.S. App. 169a. Vote-dilution claims require examination of *voting-eligible* population. *See, e.g.*, *LULAC*, 548 U.S. at 429.

5. There was no discriminatory intent or effect in Nueces County state-house districts.

Nueces County's state-house plan is the only area where the district court sustained a VRA §2 vote-dilution results claim in addition to an intent claim. But neither of those findings can withstand scrutiny, as plaintiffs do not and cannot contend that the Legislature could have drawn two *performing* majority-Hispanic districts in Nueces County.[10] In fact, the district court expressly declined to hold that VRA §2 required the Legislature to draw two majority-minority districts in Nueces County. H.J.S. App. 60a. That is fatal to plaintiffs' claims.

Nevertheless, the district court found both vote-dilutive intent and vote-dilutive effects on the basis that the 2011 Legislature failed to "explor[e] whether two HCVAP-majority districts wholly within Nueces County should be drawn." H.J.S. App. 59a. But any additional "exploration" would have been futile because two *performing* majority-Hispanic districts could not be drawn. Plaintiff MALC's own expert concluded that drawing two Hispanic-CVAP-majority districts wholly within Nueces County would result in "a lack of real electoral opportunity in *both* districts." H.J.S. App. 44a (emphasis added). The Legislature's choice to avoid that pitfall was neither intentional nor actual vote dilution.

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[10] Plaintiffs do not challenge the district court's holding that VRA §2 did not require the State to break its whole-county rule. *See* Br.66 (citing H.J.S. App. 49a-50a, 59a).

B. There Was No Racial Gerrymandering in CD35.

Plaintiffs do not deny that CD35 was drawn as one of seven majority-Hispanic districts in the region, or that the Legislature was required to draw seven such districts in 2011.[11] Nor do plaintiffs argue that the *Gingles* preconditions, including racial bloc voting, are not satisfied in CD35 as a whole. *See* U.S.Br.48. That should lay to rest any doubts about whether the Legislature had the requisite "good reasons" to make it a majority-minority district.

Plaintiffs nonetheless claim (C.Br.38-39) that CD35 was a racial gerrymander because racial bloc voting does not exist *in Travis County*—which comprises only a small fraction of the population and area of CD35.[12] *See* U.S.Br.48. Plaintiffs fundamentally misunderstand the *Gingles* inquiry. As this Court explained just last Term, "[t]he ultimate object of the inquiry" is the "district as a whole." *Bethune-Hill*, 137 S. Ct. at 800. Indeed, it must be, because the question under the third *Gingles* condition is whether "racially polarized voting prevents" a minority group from electing its candidate of choice. *Cooper*, 137 S. Ct. at 1470 (quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993)).

Cooper v. Harris does not support plaintiffs' argument (C.Br.43) that the absence of racial bloc voting in a

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[11] The relevant region is South, Central, and West Texas. C.J.S. App. 423a. Plaintiffs' term "the envelope," C.Br.4, was concocted in litigation to establish a fictitious geographic boundary.

[12] Travis County accounts for only 21% of CD35's population. C.J.S. App. 181a.

portion of a district defeats the third *Gingles* condition. *Cooper* held that the State lacked good reasons to believe that VRA §2 required it to add additional minority voters to an *existing* district that consistently elected minority-preferred candidates. 137 S. Ct. at 1465-66. *Cooper* did not hold that VRA §2 cannot justify a *new* district, like CD35, merely because racial bloc voting may not exist in a portion too small to control outcomes in the district as a whole.

Plaintiffs rely on *Shaw v. Hunt*, 517 U.S. 899, 916 (1996), to argue that the Legislature did not have license to draw a majority-minority district "anywhere"—by which they mean to draw a majority-minority district that included Travis County. C.Br.42. But the Legislature could lawfully draw the district anywhere it had good reason to believe all three *Gingles* factors were met. *Cf. Shaw*, 517 U.S. at 916 (racial classification did not remedy VRA violation because district did not meet first *Gingles* requirement). And that is exactly what the Legislature did when it created CD35.

In all events, the VRA-compliance defense to a racial-gerrymandering claim does not require a "perfect" VRA analysis ahead of time. *Cooper*, 137 S. Ct. at 1464. Rather, so long as the Legislature had "good reason" to believe the district would remedy a potential VRA §2 problem (even if it turns out that the VRA did not actually require the district), then the district is not a racial gerrymander. *Id.* at 1470. Here, plaintiff's counsel MALDEF proposed CD35's Austin-to-San-Antonio configuration, C.J.S. App. 411a; and the Latino Task Force plaintiffs supported CD35, C.J.S. App. 174a. These are

about the best reasons possible to believe that CD35 was needed to satisfy VRA §2.

Plaintiffs' real complaint is not that the Legislature included part of Travis County in CD35, but that it eliminated an Anglo-majority crossover district previously based in Travis County. But the district court did not find a violation on this basis, Br.47 n.12, because it correctly recognized that §2 does not require the State to preserve crossover districts. C.J.S. App. 409a (citing *Bartlett*, 556 U.S. at 23). Plaintiffs racial-gerrymandering claim is just another attempted end-run around *Bartlett*.

IV. There Was No Racial Gerrymandering In HD90.

Finally, the 2013 Legislature did not engage in racial gerrymandering when it modified HD90 to accommodate requests from two different groups of minority voters. Plaintiffs do not dispute that HD90 was drawn as a majority-Hispanic district at plaintiffs' request in 2011 and retained by the district court in 2012. *See* H.J.S. Supp. App. 258a-259a. They do not suggest that this configuration was not required by VRA §2, nor do they attempt to defend the district court's patently incorrect holding that VRA compliance is just "a vague goal," rather than a defense to a racial-gerrymandering claim. And the only other explanation the district court offered for its ruling on HD90 is readily refuted by the undisputed evidence. According to the district court, "no one considered the legal significance of the 50% [Spanish-surname-voter-registration] target in terms of compliance with the VRA." H.J.S. App. 82a. But the record shows that plaintiff MALC specifically objected to the initial draft amendment to HD90 on the ground that reducing the

Spanish-surname-voter-registration population in HD90 below 50% would substantially dilute Hispanic voting strength. J.A. 398a-403a.[13]

Plaintiffs do not dispute that this objection directly motivated the incumbent's chief of staff—whose intent the district court attributed to the Legislature—to consider racial data to maintain HD90's Spanish-surname-voter-registration majority.[14] Instead, they blithely suggest that the Legislature should have simply refused to bring the Como neighborhood back into HD90. H.Br.54-55 & n.15. But plaintiffs tellingly do not acknowledge that Como is a predominantly African-American neighborhood—they describe it as "non-Latino," H.Br.54—or that residents of Como specifically asked to return their neighborhood to HD90, where it had been for decades. H.J.S. App. 71a-72a. There was nothing unlawful about returning Como to HD90 so long as the Legislature maintained HD90 as a majority-Hispanic district.

Indeed, even though the Legislature made sure that HD90 maintained a Hispanic voting majority, the State *still* faced an intentional-vote-dilution claim in HD90. And the district court rejected that claim only because the Legislature retained HD90 as a majority-Hispanic

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[13] Plaintiffs cannot avoid that evidence based on "credibility determinations." H.Br.53. They identify no credibility determination related to HD90, and none appears in the district court's order.

[14] Plaintiffs fault the Legislature for failing to compile a detailed administrative record in HD90, H.Br.54, but that is not required, *see Bush v. Vera*, 517 U.S. 952, 966 (1996) (plurality op.); *accord id.* at 1026 (Stevens, J., dissenting), and it does not change the undisputed facts.

district. H.J.S. App. 83a-84a. If that does not qualify as "good reason" to retain a majority-Hispanic district, *Cooper*, 137 S. Ct. at 1470, then States have no breathing room left to satisfy both the Constitution and the VRA.

CONCLUSION

The Court should reverse the district court's orders insofar as they invalidate districts in Plan C235 and Plan H358.

Respectfully submitted.

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APRIL 2018

Nos. 17-586 and 17-626

In the Supreme Court of the United States

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL., APPELLANTS

v.

SHANNON PEREZ, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

Nos. 17-586 and 17-626

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL., APPELLANTS

v.

SHANNON PEREZ, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF FOR THE UNITED STATES

Plaintiffs do not meaningfully dispute that the district court's analysis of the intentional-vote-dilution claims rested on erroneous legal premises. Instead of asking whether plaintiffs had proven that the 2013 Legislature enacted the 2013 plans for the purpose of harming minority voters, the court presumed that discriminatory motives of a prior legislature would "carry over" to invalidate future legislative action—the substance of which that same court had already provisionally approved—unless the State established it had affirmatively "removed" the "taint" of prior discrimination. C.J.S. App. 46a. As our opening brief explains, that notion of persistent discriminatory intent is directly contrary to the strong presumption of good faith that should apply when a State adopts remedial plans that a court has reviewed and, after adversarial testing, provisionally found to be lawful.

The district court's treatment of Congressional District 35 (CD35) similarly rested on flawed legal prem-

ises. Because racial-gerrymandering claims are addressed "holistic[ally]" at the "district" level, *Bethune-Hill* v. *Virginia State Bd. of Elections*, 137 S. Ct. 788, 800 (2017), the absence of racially polarized voting in Travis County—part of which constitutes, in turn, part of CD35—does not demonstrate that the 2013 Legislature lacked a sound basis to conclude that CD35 satisfied Section 2 of the Voting Rights Act (VRA). On the contrary, the court's own 2012 decision provisionally rejecting plaintiffs' claims was itself sufficient to give the State "good reasons" to believe in 2013 that CD35 was lawful. *Id.* at 795. Plaintiffs' arguments do not show otherwise.

I. THIS COURT MAY EXERCISE JURISDICTION OVER THESE APPEALS

A. Under 28 U.S.C. 1253, this Court possesses appellate jurisdiction over orders granting or denying interlocutory or permanent injunctions in three-judge district court actions brought under 28 U.S.C. 2284(a). As previously explained (U.S. Br. 20-23),[1] the district court's August 15 and August 24, 2017 orders are properly understood to have enjoined future use of the State's 2013 congressional and State House plans and are therefore appealable.

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[1] "U.S. Br." refers to the United States' opening brief; "Texas Br." refers to Appellants' opening brief; "Cong. Br." refers to plaintiffs' response brief in No. 17-586; and "House Br." refers to plaintiffs' response brief in No. 17-626. See U.S. Br. 1 n.1 (explaining other abbreviations).

As noted by plaintiffs (Cong. Br. 26), the district court did not expressly style its orders as injunctions.[2] But that consideration is not dispositive. As this Court held in interpreting 28 U.S.C. 1292(a)(1)—an analogous statute allowing for immediate appellate review of injunctions—even an order not styled as the grant or denial of an injunction is nonetheless appealable if the order has the "practical effect" of granting or denying injunctive relief; "might have a 'serious, perhaps irreparable, consequence'"; and "can be 'effectually challenged' only by immediate appeal." *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981) (citation omitted).

The district court's orders meet those standards. See U.S. Br. 20-23. The court found that the 2013 congressional and State House plans contained "statutory and constitutional violations" that "must be remedied by either the Texas Legislature or this Court." C.J.S. App. 118a; H.J.S. App. 84a-85a (similar). The court then gave the Governor only *three days* to decide whether to call the Legislature into special session to enact new redistricting plans, or instead leave the drawing of new maps to the court in highly expedited proceedings. Those rulings left little doubt that Texas would be forbidden from using its 2013 plans for the 2018 elections. Had the State been required to wait until the court entered an express injunction, that order would likely have come too late for

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[2] Several plaintiffs had requested immediate injunctive relief. See, *e.g.*, D. Ct. Doc. 1525, at 42 (July 31, 2017) (plaintiff MALC) ("[T]he plans containing these defects must be enjoined and their defects must be remedied."); D. Ct. Doc. 1527-1, at 2 (July 31, 2017) (Quesada plaintiffs) ("The Court should enter judgment permanently enjoining further use of Plan C235."); D. Ct. Doc. 1529-1, at 1 (July 31, 2017) (NAACP plaintiff-intervenors) ("If [the court] finds that such unconstitutional intent existed, it must enter an immediate and permanent injunction.").

appellate review before deadlines associated with the 2018 election cycle. Under these unusual circumstances, a State whose existing legislative apportionment plans are invalidated in litigation under 28 U.S.C. 2284(a), and whose Governor is given such an ultimatum concerning the State's legislative process, need not await entry of an express injunction before obtaining appellate review of the district court's order.

B. 1. Plaintiffs fail to explain why the district court's orders do not satisfy *Carson*'s elements. They instead argue (Cong. Br. 26; House Br. 30) that *Carson* is inapposite to Section 1253. But Section 1253 contains language materially similar to that of Section 1292(a)(1), and plaintiffs offer no sound reason why the two statutes should not be interpreted consistently. Compare 28 U.S.C. 1253 (allowing "appeal * * * from an order granting or denying * * * an interlocutory or permanent injunction"), with 28 U.S.C. 1292(a)(1) (allowing "appeal[] from * * * [i]nterlocutory orders * * * granting, * * * refusing or dissolving injunctions").

In opposing *Carson*'s application, plaintiffs urge that Section 1253 "is to be narrowly construed." House Br. 29 (quoting *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970)). But *Carson* said the same about Section 1292(a)(1). See *Carson*, 450 U.S. at 84 ("Because § 1292(a)(1) was intended to carve out only a limited exception to the final-judgment rule, we have construed the statute narrowly."); cf. *Switzerland Cheese Ass'n* v. *E. Horne's Mkt., Inc.*, 385 U.S. 23, 24 (1966) (similar). And plaintiffs' assertion (House Br. 30) that this Court "squarely refused to create a 'practical effect' exception" in *Gunn* v. *University Committee To End The War In Viet Nam*, 399 U.S. 383 (1970) and *Goldstein* v. *Cox*, *supra*, overlooks that those decisions

predated *Carson* and that in neither did the Court discuss and reject a practical-effect test.[3]

Plaintiffs also suggest (Cong. Br. 27) that the *Carson* framework should apply only when an injunction is effectively denied, and not when one is effectively granted. But this Court has stated that Section 1292(a)(1) "provide[s] appellate jurisdiction over orders that * * * have the practical effect of *granting or denying* injunctions and have 'serious, perhaps irreparable, consequence.'" *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 287-288 (1988) (emphasis added; citation omitted).

An order granting an injunction is, of course, subject to procedural requirements under Federal Rule of Civil Procedure 65(d) that do not apply to denials of injunctions. See *Gunn*, 399 U.S. at 388. But this Court has recognized that an order may amount to an injunction under 28 U.S.C. 1253 even if it fails to comply with the Federal Rules of Civil Procedure. See *Schmidt* v. *Lessard*, 414 U.S. 473, 477 (1974) (per curiam). Moreover, whatever the precise contours of the "remedy" the district court might ultimately have entered (Cong. Br. 27), it was clear from the court's orders that the State's existing maps could not be used. And this Court has reviewed injunctions barring use of existing apportionment plans even though replacement plans had not yet

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[3] In *Goldstein*, the plaintiffs sought to appeal the district court's denial of their summary-judgment motion. Although their complaint had "pray[ed] for preliminary as well as permanent injunctive relief," the plaintiffs had "t[aken] no practical step toward obtaining such relief," and the court's order thus did not constitute the denial of an injunction. 396 U.S. at 478-479. In *Gunn*, the defendants sought to appeal an interlocutory order concluding that a state statute was unconstitutional. But the defendants there acknowledged that the order was "no more than 'an advisory opinion'" inasmuch as no injunction had yet been entered. 399 U.S. at 389.

been drawn. See, *e.g.*, *Cooper* v. *Harris*, 137 S. Ct. 1455 (2017); *Sixty-Seventh Minn. State Senate* v. *Beens*, 406 U.S. 187, 190-191, 194-195 (1972) (per curiam).

Plaintiffs fault the United States (House Br. 32) for failing to distill the *Carson* framework to a simpler rule that would better "guide future litigants" in assessing appealability. But *Carson* requires consideration of whether the order will have a "'serious, perhaps irreparable, consequence'" and whether it "can be 'effectually challenged' only by immediate appeal." 450 U.S. at 84 (citation omitted). Those determinations require case-specific analysis, including consideration of real-world deadlines or other exigencies confronting the appellant. See, *e.g.*, *Stovall* v. *City of Cocoa*, 117 F.3d 1238, 1241 (11th Cir. 1997) (court's effective denial of injunction was immediately appealable because "trial in the district court [may not] conclude in time to affect the next election").

2. Plaintiffs also err in suggesting (House Br. 32 & n.12) that the circumstances here are "nearly identical" to those of *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). In *Whitcomb*, the plaintiffs filed suit in January 1969; the district court issued its liability determination in late July 1969; and that court "ga[ve] the State until October 1, 1969"—several months later—"to enact legislation remedying" the violations. *Id.* at 131, 137-138. When the legislature opted not to act, the court entered its injunctive orders in December 1969. See *id.* at 139; 307 F. Supp. 1362 (S.D. Ind. 1969); see also 396 U.S. 1055 (1970) (granting stay); 397 U.S. 984 (1970) (noting probable jurisdiction).

The chronology here was very different. Although plaintiffs promptly brought their relevant claims in 2013, the district court declined to adjudicate them immediately. It instead allowed the 2013 plans to be used—

over plaintiffs' repeated objections—for both the 2014 and 2016 elections. And in August 2017, when the court ultimately found the 2013 plans to be invalid, it gave the Governor just three days to decide whether to pursue enactment of a legislative plan. C.J.S. App. 118a; H.J.S. App. 86a. It simultaneously scheduled judicial remedial hearings for September 5 and 6, 2017—mere weeks before the State's October 1, 2017 deadline for finalizing districts for the 2018 election cycle, and likely too close to that deadline to afford adequate time for appellate review. *Ibid.*[4]

II. PLAINTIFFS HAVE FAILED TO ESTABLISH THAT THE 2013 LEGISLATURE ENGAGED IN INTENTIONAL VOTE DILUTION

A. Plaintiffs Bear The Heavy Burden Of Proving That The 2013 Legislature Acted With A Discriminatory Racial Purpose In Permanently Adopting The 2012 Court-Ordered Interim Plans

1. As explained in our opening brief (at 24-29), a legislative redistricting plan may be invalidated on grounds of intentional vote dilution only if a plaintiff shows that the legislature adopted that plan for a discriminatory purpose. In analyzing such a claim, a court must accord a "presumption of good faith [to] legislative enactments," *Hunt* v. *Cromartie*, 526 U.S. 541, 553 (1999) (citation

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[4] Both plaintiffs and the district court acknowledged the significance of the October 1, 2017 deadline for the timing of further litigation. See, *e.g.*, D. Ct. Doc. 1389, at 1 (May 1, 2017) ("The Court is aware of the condensed schedule that must be implemented in light of the 2018 election deadlines."); D. Ct. Doc. 1372, at 3 (Apr. 24, 2017) (NAACP plaintiffs) (requesting expeditious resolution because "[t]he first steps in the 2018 election process begin early this fall"); D. Ct. Doc. 1375, at 2 (Apr. 24, 2017) (African-American Congressperson plaintiffs) (similar).

omitted), and the burden of proof rests on the plaintiff, see *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997). Moreover, although an enactment's "impact" and "historical background" are both relevant, *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-267 (1977), courts must not infer discriminatory *intent* solely from disparate *effects*, see U.S. Br. 27-28, and a finding of *past* intentional discrimination alone ordinarily cannot sustain an inference of *present* discrimination, see *id.* at 28.

As also explained (U.S. Br. 29-31), this Court's cases suggest the further principle that a court should afford particular weight in the discriminatory-purpose assessment to a state legislature's enactment undertaken in reliance on a court-ordered remedial plan. When a court has found in a reasoned decision that a court-ordered interim redistricting plan redresses all likely violations of law, and when the legislature permanently adopts that plan to replace its original enactment, the normal presumption of good faith accorded to legislative enactments is heightened by the State's acceptance of the judicially approved plan. It is appropriate for plaintiffs to bear a heavy burden in establishing that a state legislature's adoption of a court-ordered plan was intentionally discriminatory.

2. Plaintiffs' response briefs do not dispute that the district court's legal analysis was inconsistent with the foregoing principles. Plaintiffs instead argue (House Br. 35-40; Cong. Br. 27-34) that those principles should not be applied in this particular case. Those arguments are unpersuasive.

Plaintiffs' chief submission is that the principles set forth in our opening brief are irrelevant because this case does not involve a "court-drawn" or "judicial[ly]"

created plan. House Br. 1, 19, 27, 39-40; see Cong. Br. 1, 24. Plaintiffs emphasize that most districts at issue here were first drawn in the State's 2011 legislative plans, not in the 2012 interim plans.[5] But our argument rests on the fact that the interim plans were "judicially approved" and "court-ordered" (U.S. Br. 18, 30), not on the mistaken understanding that the districts were "court-drawn" in the first instance. What matters is that the court evaluated the particular plans at issue; provisionally found them to be lawful; and ordered their use for future elections. Once a court has made such determinations, it is appropriate to presume that a state legislature acts in good faith if it then adopts the judicially approved districts in permanent redistricting plans.

Plaintiffs also emphasize (House Br. 37-39; Cong. Br. 1-2, 32-33) that the district court's approval of the 2012 interim plans was "provisional" and not a final determination of whether they sufficiently redressed asserted constitutional and VRA violations in the Legislature's 2011 plans. As already explained (U.S. Br. 38-39, 42-43), however, that does not preclude application of a strong presumption of good faith to the Legislature's subsequent incorporation of the court-ordered districts in its enactment of the *2013 plans*. A state legislature could quite reasonably conclude that a federal court's approval of an interim map provides, at a minimum, highly probative evidence that the map complies with federal law. Indeed, here, the court itself believed that its interim determinations were sufficiently reliable to justify use of the at-issue districts not only for the 2012 elections, but for the 2014 and 2016 elections as well. See U.S. Br. 10-13.

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[5] As plaintiffs note, State House District 103 was adjusted in immaterial respects in 2013. See House Br. 2.

To recognize the force of the 2012 interim decisions is not, as plaintiffs suggest, to grant the State a "safe harbor" from further liability. House Br. 37. The district court's provisional approval of particular aspects of the 2011 plans did not preclude the court from ultimately reaching a contrary final determination regarding the 2011 plans. See *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981) (rulings at preliminary-injunction stage "are not binding at trial on the merits"). In these appeals, however, the question is not whether the legislative plans adopted in 2011 would ultimately have been found lawful, or whether the court's 2012 interim plans would ultimately have been found sufficient to redress any violations in the 2011 plans, but rather whether the revised plans enacted by the Legislature in 2013 were lawful. And as relevant to plaintiffs' intentional-vote-dilution claims, the question is whether the Legislature acted with a *discriminatory purpose* in enacting those 2013 plans. That question must be resolved by looking to the intent of the 2013 Legislature—an issue that could not have been adjudicated in 2012.

Plaintiffs' argument also overlooks that the 2012 interim plans were the product of the unique analytical framework mandated by *Perry* v. *Perez*, 565 U.S. 388 (2012) (per curiam). In *Perry*, this Court invalidated the district court's prior remedial plans, which had rested on that court's "own concept of the 'collective public good,'" and ordered the court to devise new interim plans for the 2012 elections that paid appropriate heed to the State's policy goals. *Id.* at 396. The Court ordered that, as to those districts in the 2011 plans challenged under Section 2 of the VRA or the Fourteenth Amendment, the district court should retain those districts in its interim

plans unless plaintiffs satisfied the "likelihood of success" preliminary-injunction standard. *Id.* at 394. As to challenges asserted under Section 5 of the VRA in the separately pending preclearance litigation, however, the Court established a "different," more plaintiff-friendly, standard. *Ibid.* As to those claims, the Court instructed the district court to "tak[e] guidance from [the] State's policy judgments" only to the extent that the State's districts "[did not] stand a reasonable probability of failing to gain § 5 preclearance." *Id.* at 395. If a "not insubstantial" claim existed that a challenged district "'[]either ha[d] the purpose []or * * * the effect of denying or abridging the right to vote on account of race or color,'" the court was required to reject that district rather than incorporate it into the interim plan. *Id.* at 391 (quoting 42 U.S.C. 1973c(a) (2012)), 395.

The district court faithfully applied those standards on remand. It concluded that plaintiffs had not established a likelihood of success on their claims that CD27 and CD35 violated Section 2 of the VRA or the Fourteenth Amendment. C.J.S. App. 408a-415a, 417a-423a. The court further ruled that various congressional and State House districts from the 2011 plans would not be included in the interim 2012 plans because plaintiffs had met the "low 'not insubstantial' standard" applicable to Section 5 challenges. H.J.S. App. 313a; see *id.* at 305a, 307a, 312a, 313a; C.J.S. App. 397a-408a. The court explained with respect to the congressional plan that it had "reviewed the post-trial briefing" from the preclearance litigation, C.J.S. App. 380a, and concluded that the interim plans sufficiently "resolve[d] the 'not insubstantial' § 5 claims," *id.* at 396a. And with respect to the State House plan, the court stated that "[t]o the extent that legal challenges are levied against any of th[e] [unchanged

State House] districts, we preliminarily find that * * * any Section 5 challenges are insubstantial." H.J.S. App. 303a.[6] The 2013 Legislature was aware that the district court in 2012 had applied the framework established by this Court's *Perry* decision, see, *e.g.*, Texas Br. 35a (legislative findings), and the court's announcement that it had made all necessary changes to satisfy that framework further underscores the presumptive reasonableness of the Legislature's decision to rely on the court's orders in enacting permanent redistricting plans.

3. Plaintiffs' remaining arguments rest on inapt legal principles. Like the district court (C.J.S. App. 34a-39a), plaintiffs place heavy reliance on *Hunter* v. *Underwood*, 471 U.S. 222, 223 (1985), in which this Court invalidated an extant provision of the 1901 Alabama Constitution because it had been adopted for the purpose of disenfranchising black voters. Cf. Cong. Br. 30 (asserting *Hunter* to be "indistinguishable"); House Br. 44-45 (similar). But as already explained (U.S. Br. 33-34), *Hunter* did not involve a subsequent legislative enactment, and the Court

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[6] Among the areas discussed in post-trial briefing in the preclearance litigation were Nueces County (containing CD27, HD32, and HD34); Bell County (containing HD54 and HD55); and Dallas County (containing HD103, HD104, and HD105). See, *e.g.*, 11-cv-1303 Docket entry (Docket entry) No. 207, at 5, 20-22 (Feb. 7, 2012) (challenging CD27 as retrogressive); Docket entry No. 206, at 4-5 (Feb. 17, 2012) (asserting that elimination of HD33 from Nueces County was evidence of intentional discrimination); Docket entry No. 198, at 20-21 (Feb. 6, 2012) (asserting that Legislature's decision to "split the city [of Killeen] between [House] Districts 54 and 55" was "motivated by intent to discriminate against" the "growing minority population"); Docket entry No. 195, at 6-7 (Feb. 6, 2012) (asserting that the "extremely contorted district boundaries" of, *inter alia*, HD103, HD104, and HD105 reflected State's effort to "cancel out [the] minority's ability to elect").

contemplated that the challenged constitutional provision might have been valid "if enacted today without any impermissible motivation." 471 U.S. at 233. That is because the determination whether a particular enactment was intentionally discriminatory ultimately turns on the intent of the enacting legislature, not that of prior legislatures.

Plaintiffs evidence a similar misunderstanding in urging that "repeal and reenactment" of a statute ordinarily does not change a statute's meaning or interrupt its effectiveness. House Br. 40; see Cong. Br. 29, 31 n.17. Here, the question is not how to interpret the "substantive provisions" of the 2013 plans (Cong. Br. 29), but whether the Legislature enacted those plans for the purpose of harming minority voters. Although the meaning of a statute's text is ordinarily presumed to remain consistent when reenacted "without change," *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978), the law recognizes no similar presumption or canon that the subjective intent of a prior legislature "remains legally operative" until some affirmative contrary showing is made, *Johnson* v. *Governor*, 405 F.3d 1214, 1223 (11th Cir.) (en banc), cert. denied, 546 U.S. 1015 (2005).

Plaintiffs and their amici also err in relying on the unique remedial principles governing desegregation of public schools. See House Br. 46-47; Common Cause Amicus Br. 28-29; Campaign Legal Ctr. Amicus Br. 4-5, 17-18. In most contexts, the burden of proof rests on the party alleging a violation of federal law. *Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005); see U.S. Br. 26. In "the special context of school desegregation cases," however, this Court concluded that "'fairness' and 'policy' require state authorities to bear the burden of explaining ac-

tions or conditions which appear to be racially motivated." *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 208-209 (1973). That atypical "allocation of the burden of proof," *id.* at 209, reflects this Court's earlier judgment that school districts are "charged with [an] *affirmative duty* to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," *Green* v. *County Sch. Bd.*, 391 U.S. 430, 437-438 (1968) (emphasis added); see *United States* v. *Fordice*, 505 U.S. 717, 731 (1992) (State bore "burden of proving that it has dismantled its prior system."). This Court has never suggested that the special remedial framework it developed for desegregation cases should apply to legislative redistricting. To the contrary, the Court has recognized that the plaintiff bears the burden of proving intentional discrimination in voting cases, see *Bossier Parish*, 520 U.S. at 481, and that burden remains on the plaintiff in litigation challenging a State's legislative adoption of a remedial plan in response to a prior judicial order, see, *e.g.*, *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978) (principal opinion); U.S. Br. 28-29 (citing other authorities).

Finally, plaintiffs are wrong to suggest (Cong. Br. 28) that the district court's approach is necessary to ensure that legislatures do not engage in opportunistic behavior. The strong presumption of good faith advocated by the United States applies when a state legislature enacts a plan ordered by a district court after determining that it satisfies (or likely satisfies) constitutional and statutory requirements, not any time that a legislature "reenact[s]" a statute. *Ibid.* Moreover, our approach does not dictate a result as a matter of law. If a plaintiff shows that a legislature permanently adopted a judicially approved plan not because it legitimately believed that plan

to be lawful, but rather because it sought to preserve discrimination that somehow escaped judicial invalidation, a plaintiff can succeed in establishing its claim of intentional vote dilution. See U.S. Br. 30-31. A court is not required to "take at face value" (Cong. Br. 2) a State's assertion that its reenacted plan is lawful. But plaintiffs bear a heavy burden in establishing that a state legislature's adoption of a court-ordered plan was intentionally discriminatory.

B. Plaintiffs Have Not Identified Facts Sufficient To Rebut The Presumption Of Good Faith

As previously explained (U.S. Br. 31-37), it was only by relying on the flawed assumption that discriminatory intent "carr[ies] over" from one plan to the next, C.J.S. App. 46a, unless and until a State proves it has "cured [the] taint," *id.* at 40a, that the district court reached its ultimate conclusion that the 2013 plans were intentionally discriminatory. The court did not point to any evidence sufficient to rebut the strong presumption of good faith that applies in these circumstances. Nor do plaintiffs make any real effort to do so before this Court.

Plaintiffs in the congressional case consign their response to a single footnote, asserting that "[e]ven were the Court to determine that the proper focus of the questions of motive, intent, and purpose is the action of the 2013 Legislature instead of the 2011 Legislature, * * * [the district court's] findings are not clearly erroneous and should not be overturned by the Court." Cong. Br. 34 n.20. The other plaintiffs similarly ask this Court to ignore the district court's errors of law by invoking the "deferential clear-error standard." House Br. 41. As this Court has long recognized, however, the clear-error standard does not apply to "a finding of fact that is predicated on a misunderstanding of the governing rule of

law." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984); cf. *Cooper*, 137 S. Ct. at 1474 ("[W]e review a district court's finding as to racial predominance only for clear error, except when the court made a legal mistake.").

Instead of identifying record evidence that demonstrates discriminatory intent by the 2013 Legislature, plaintiffs reiterate the conclusory statements in the district court's opinions. For example, plaintiffs recite that the court "found that the State stuck with its original districts because it 'intended' to 'maintain[]' the discriminatory 'taint' that had originally motivated the districts." House Br. 41 (quoting H.J.S. App. 359a) (brackets in original). But the cited page of the court's decision refers to no evidence, and instead expounds upon the court's legal premise that the "racially discriminatory intent and effects that [the court] previously found in the 2011 plans carry over into the 2013 plans where those district lines remain unchanged." H.J.S. App. 359a.

Similarly, plaintiffs echo the district court's purported "f[inding]" that the 2013 Legislature "'did not adopt the Court's plans with the intent to adopt legally compliant plans free from discriminatory taint, but as part of a litigation strategy.'" Cong. Br. 20 (quoting C.J.S. App. 40a); see House Br. 19-20, 43. As noted (U.S. Br. 41), a State's decision to accept a judicially vetted remedial plan presumptively furthers—not frustrates—Congress's goals of preventing and redressing unlawful discrimination. And plaintiffs point to nothing in the trial record showing that the State's "litigation strategy" was a pernicious one designed to reinforce existing discrimination, as opposed to an effort to enact a lawful redistricting plan. Plaintiffs' assertion that "Texas wanted to bring this litigation to an end in order to keep in place

the districts its Legislature had drawn in 2011 for discriminatory reasons," House Br. 45 (emphasis omitted), appears to rest only on speculation, not on evidence.

Plaintiffs also posit that the district court "heard Texas's witnesses [and] found their proffered explanations pretextual." House Br. 41 (citing H.J.S. App. 345a-346a, 348a, 353a-359a); cf. C.J.S. App. 32a-46a (containing same passages). But the cited pages do not reference any testimony that the court found "pretextual" or otherwise not credible. Instead, those pages contain discussion articulating the court's legal theory, H.J.S. App. 345a-348a, and explaining its conclusion that the 2013 Legislature failed to "engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans," *id.* at 353a; see *id.* at 353a-359a. The sole witness for the State whose testimony the court described at any length was Jeff Archer, the Legislature's chief counsel. See H.J.S. App. 356a-358a & nn.43, 45; C.J.S. App. 43a-45a & nn.43, 45. But the court credited that testimony: Archer testified, and the court agreed, that the 2013 Legislature was aware that the interim plans were based on provisional rulings rather than "final determinations," C.J.S. App. 43a, and that enacting the 2013 plans would likely not moot the litigation because "Plaintiffs would pursue claims against the interim maps," *id.* at 44a n.45.

It is true that the 2013 plans were enacted by "a substantially similar Legislature with the same leadership" as existed in 2011. House Br. 46 (quoting H.J.S. App. 352a n.37). Contrary to plaintiffs' assumption, however, a court is not "entitled to infer" (*ibid.*) that a later legislature has acted with discriminatory intent solely because a prior legislature was found to have done so. "[P]ast discrimination cannot, in the manner of original

sin, condemn governmental action that is not itself unlawful." *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion). If the existence of past misconduct were sufficient, standing alone, to sustain a finding of present misconduct, the presumption of legislative good faith would have no meaning. U.S. Br. 28.

Plaintiffs suggest that the Legislature enacted the 2013 plans "with no discussion or debate over concerns raised by minority legislators." House Br. 46. Plaintiffs do not identify evidence in the trial record that they believe supports that observation. In any event, plaintiffs fail to explain why the appropriate inference to be drawn from the Legislature's adoption of the interim plans largely without amendment was that the Legislature was motivated by intentional discrimination, as opposed to an interest in enacting lawful plans likely to survive further challenge. Indeed, the Legislature may have been concerned that if it engaged in race-conscious revisions of the interim plans, it could later face claims that it engaged in impermissible racial gerrymandering by drawing majority-minority districts that the court itself had previously determined were likely not required by the VRA. Cf. *id.* at 52 (arguing that legislative revisions to HD90 in 2013 caused it to become a "deliberate racial gerrymander").

Finally, plaintiffs seek to treat as evidence of discrimination the fact that the challenged districts in the 2013 plans were "*exactly* the same" as the corresponding districts in the 2011 plans. House Br. 46; see Cong. Br. 1, 18, 24, 28. But those districts were identical precisely because the district court, consistent with this Court's directives in *Perry*, had allowed their continued use in 2012 after finding that plaintiffs' challenges to

those districts were unlikely to succeed or were insubstantial. The very facts that render a legislative action entitled to the strong presumption of good faith cannot simultaneously rebut that presumption.

III. CONGRESSIONAL DISTRICT 35 IS NOT AN UNCONSTITUTIONAL RACIAL GERRYMANDER

A. The district court also erred in concluding that CD35 was an unconstitutional racial gerrymander. See U.S. Br. 44-48. As an initial matter, the circumstances of the Legislature's action indicate that race did not predominate in CD35's enactment in 2013 because the Legislature enacted the 2013 congressional plan so that all of its districts would match precisely the districts provisionally found to be lawful in 2012. Cf. Texas Br. 34a-36a (text of 2013 enactment "adopt[ing]" court's interim redistricting plan "as the [State's] permanent plan"). .

In any event, CD35 would survive strict scrutiny because the State had "good reasons" to believe that the VRA required it to draw CD35 in 2011 and to maintain it in 2013. *Cooper*, 137 S. Ct. at 1464 (citation omitted). Indeed, in 2011, a subset of plaintiffs proposed and supported the creation of CD35 as "an appropriate § 2" Latino opportunity district. C.J.S. App. 174a. And in 2012, the district court itself provisionally concluded that CD35 was a valid Section 2 district. *Id.* at 409a-415a. Those considerations provided, at a minimum, sufficient "breathing room" for the State to reasonably conclude in 2013 that CD35 addressed a VRA need and that maintaining it would not violate the Equal Protection Clause. *Cooper*, 137 S. Ct. at 1464 (citation omitted).

B. Plaintiffs' responses identify no sound basis for concluding otherwise. Plaintiffs assert that the district court was correct to find racial predominance because "nearly

every traditional districting principle in CD35 was subordinated to race." Cong. Br. 36. But that argument improperly focuses on 2011, when CD35 was first drawn, rather than on 2013, when the operative congressional plan was enacted in accordance with the district boundaries that the court provisionally found lawful in 2012.

Plaintiffs' discussion of strict scrutiny repeats the district court's errors. Plaintiffs note that "[t]he district court found * * * that 'the third *Gingles* precondition is not present in a significant portion of the district'" because "Travis County Anglos lack cohesion and split their vote." Cong. Br. 38 (citation omitted); cf. *Thornburg* v. *Gingles*, 478 U.S. 30, 51 (1986) (requiring that the "majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate"). But as this Court has explained, "the basic unit of analysis for racial gerrymandering claims * * * is the district," and a court should not focus on "particular portions [of the district] in isolation." *Bethune-Hill*, 137 S. Ct. at 800. The district court here failed to address whether voting patterns were racially polarized across CD35 as a whole. And had it performed the required "holistic analysis," *ibid.*, the court necessarily would have concluded that racially polarized voting existed in CD35. See U.S. Br. 47-48.

Plaintiffs also theorize (Cong. Br. 39) that the State cannot "seek refuge in § 2" because the creation of CD35 was not contemporaneously "informed by" an "inquiry into § 2 requirements." But as already noted, a group of plaintiffs themselves urged the Legislature to draw CD35 in 2011 precisely because they believed the district to be required by Section 2. See C.J.S. App. 174a; C.J.S. Supp. App. 152a, 158a, 315a-317a, 319a-320a. All agreed in 2011 that at least seven Latino opportunity districts

needed to be drawn in South and West Texas in order to comply with the VRA, see C.J.S. App. 112a & n.85, 126a-127a, 176a, and CD35 extended within that region. Moreover, this Court's racial-gerrymandering precedents do not require a State, in drawing a Section 2 district, to develop the full factual record that it could later marshal in subsequent litigation. To survive strict scrutiny, it suffices that the State's "actual purpose" was compliance with the VRA and that it had a "strong basis in evidence to support that justification," even if that basis in evidence was not contemporaneously memorialized in exhaustive detail. *Shaw* v. *Hunt*, 517 U.S. 899, 908 n.4 (1996). And when the Legislature enacted the 2013 plan containing CD35, the district court's 2012 decision itself furnished a strong basis in evidence.

Finally, plaintiffs suggest that CD35 cannot survive strict scrutiny because the Legislature's "'actual purpose'" in drawing CD35 was to "dismantle[] the existing crossover district there" (*i.e.*, former CD25). Cong. Br. 39 (citation omitted); cf. U.S. Br. 10 n.5 (defining "'crossover' district"). But the district court made no such finding. Indeed, plaintiffs sought to press the same argument about CD25 as a freestanding claim of intentional racial discrimination, but the district court expressly declined to reach that claim. See C.J.S. App. 111a n.83, 172a n.38. And when the court earlier addressed that claim in the context of the 2012 interim plans, it was "unable to conclude" that the "dismantling of CD 25 was motivated by a discriminatory purpose as opposed to partisan politics." *Id.* at 415a.[7] Plaintiffs thus

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[7] The United States argued in the preclearance litigation that CD25 was not a "protected crossover district" and that its dismantlement therefore was not unlawful. *Texas* v. *United States*, 887 F. Supp. 2d

fail in their effort to indirectly challenge the elimination of former CD25 by recasting it as a racial-gerrymandering challenge to CD35.

* * * * *

For the foregoing reasons and those stated in our opening brief, the Court should reject the bases for the district court's findings of intentional discrimination as to eight unchanged districts, and it should reverse the finding of a racial gerrymander as to CD35.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

APRIL 2018

133, 179 & n.1 (D.D.C. 2012) (separate opinion for the Court by Howell, J.), vacated and remanded, 570 U.S. 928 (2013).

Nos. 17-586 and 17-626

IN THE

Supreme Court of the United States

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL.,
Appellants,

v.

SHANNON PEREZ, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF CAMPAIGN LEGAL CENTER, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") was formed in 1963 at the request of President John F. Kennedy to involve private attorneys throughout the country in the effort to ensure civil rights to all Americans. Protection of the voting rights of racial and language minorities is an important part of the Lawyers' Committee's work. The Lawyers' Committee has represented litigants in numerous voting rights cases throughout the nation over the past 50 years, including cases before this Court. *See, e.g., Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013); *Shelby County v. Holder*, 570 U.S. 529 (2013); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000); *Young v. Fordice*, 520 U.S. 273 (1997); *Clark v. Roemer*, 500 U.S. 646 (1991); *Clinton v. Smith*, 488 U.S. 988 (1988); and *Connor v. Finch*, 431 U.S. 407 (1977). The Lawyers' Committee has also participated as *amicus curiae* in other significant voting rights cases in this Court, including *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016); *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Bartlett v. Strickland*, 556 U.S. 1 (2009); *Shaw v. Reno*, 509 U.S. 630 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); and *City of Mo-*

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[1] No counsel for any party has authored this brief in whole or in part, and no one other than *amici curiae*, their members, or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

bile v. Bolden, 446 U.S. 55 (1980). The Committee has an interest in the instant appeal because it raises important voting rights issues that are central to its mission.

Amicus curiae Campaign Legal Center (CLC) is a non-partisan, non-profit organization that works in the area of election law, generally, and voting rights law, specifically, generating public policy proposals and participating in state and federal court litigation throughout the nation regarding voting rights. CLC has served as *amicus curiae* or counsel in voting rights and redistricting cases before this Court, including, *inter alia*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788 (2017); *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016); *Shelby County*, 570 U.S. 529; and *Bartlett*, 556 U.S. 1. CLC currently represents minority voters in several actions under the Voting Rights Act and the U.S. Constitution, including *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc), and *Thompson v. Alabama*, No. 2:16-cv-783 (M.D. Ala.). CLC is deeply committed to preserving the rights of minority voters to access the ballot box free from discrimination.

Amicus curiae the NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit, non-partisan law organization established under the laws of New York in 1940 under the leadership of Thurgood Marshall to assist Black people in the full, fair, and free exercise of their constitutional rights. LDF has been involved as counsel or *amicus curiae* in numerous precedent-setting litigation relating to minority political representation and voting rights

before federal courts, including lawsuits involving constitutional and statutory challenges to discriminatory redistricting plans or those otherwise implicating minority voting rights. *See, e.g.*, *Gill v. Whitford*, 16-1161; *Husted v. APRI*, No. 16-980; *Evenwel*, 136 S. Ct. at 1120; *ALBC*, 135 S. Ct. at 1257; *Shelby County*, 570 U.S. 529; *Nw. Austin Mun. Dist. No. 1*, 557 U.S. 193; *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 501 U.S. 419 (1991); *Gingles*, 478 U.S. 30; *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977); and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973).

SUMMARY OF ARGUMENT

This Court should affirm the three-judge court's holding that Texas's 2013 maps unlawfully furthered and maintained the purposeful dilution of minority voting strength in the 2011 maps and that the districts impacted by that purposeful discrimination must be remedied. *Perez v. Abbott*, 274 F. Supp. 3d 624, 649-50, 652 (W.D. Tex. 2017) ("*Perez I*") ("The

Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans.").

The three-judge court's factual findings that the 2013 maps carried over the discriminatory intent of their predecessor maps are not clearly erroneous. The record demonstrates that the Texas Legislature adopted the 2013 maps in a strategic attempt by the Legislature to maintain as many of its discriminatory 2011 choices as possible while insulating itself from further constitutional challenge. This Court's discriminatory intent cases make clear that those discriminatory 2011 choices are unlawful in the 2013 maps as well. The three-judge court was not required, as Appellants argue, to turn a blind eye to the context of the 2013 maps. To the contrary, it was required to engage in the close examination it did of the 2013 maps in light of their inextricable relationship to the 2011 maps. *See Lane v. Wilson*, 307 U.S. 268, 275 (1939) ("The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination.").

Because it had been determined that the 2011 maps contained districts drawn with discriminatory intent, it was Texas's burden to show that the 2013 maps, which left unchanged districts that the District Court held had been drawn with discriminatory intent in 2011, did not maintain or further that intent. But regardless of who bore the burden of proof at that stage of litigation, the three-judge court had ample evidence before it to come to its conclusions that the 2013 maps were intentionally discriminatory. Moreover, any holding that failed to eliminate the discriminatory choices of the 2011 maps "root

and branch" would have deprived the Plaintiffs of a complete remedy for Texas's purposeful discrimination. *See Green v. County Sch. Bd.*, 391 U.S. 430, 437–38 (1968).

Finally, Texas's attempt to use the three-judge court's interim maps as a shield against any further remedies is at odds with the purpose of interim relief in redistricting and other time-sensitive election-law disputes. It is well established that such preliminary relief does not, and could not, settle the final rights of the parties. Indeed here, at the time of the interim map, the three-judge court warned that it had not fully adjudicated the question of which lines were infected with the Texas Legislature's discriminatory purpose. When the court did so in its 2017 ruling, it found that the intentional discrimination in the 2011 maps impacted more districts than the three-judge court initially identified in its preliminary review of the proposed interim map. Thus, Texas's argument, if it prevailed, would profoundly disrupt the incentives for both courts and parties at the interim stages of litigation by establishing interim relief as the potential outer limit of potential final relief even before full adjudication of the merits of a case. Texas's legal theory of the case—which seeks to transform an interim remedy into a constitutional shield—cannot stand.

ARGUMENT

I. THE 2013 MAPS ARE INEXTRICABLY LINKED TO THE DISCRIMINATORY 2011 MAPS.

Despite Texas's contrary representations, the 2013 maps were not new redistricting maps born of the three-judge court's imagination or a new legislative process. Rather, the 2013 maps are nothing more than the 2011 legislatively enacted maps as partially altered by the three-judge court based on its *preliminary* findings of constitutional and statutory defects. Jurisdictional App. 314a[2] ("We emphasize the preliminary and temporary nature of the interim plan[.]").

In 2011, the Texas Legislature passed redistricting maps for the congressional and state legislative districts. These maps were subject to pre-clearance under the then-applicable provisions of Section 5 of the Voting Rights Act, and pre-clearance litigation was instituted by Texas. Simultaneously, Plaintiffs challenged the 2011 maps as racially discriminatory under the Constitution and Section 2 of the Voting Rights Act.

After Texas failed to obtain a timely pre-clearance decision from the District Court for the District of Columbia, the three-judge panel in this case drew a set of interim maps to allow the 2012 Texas primary and general elections to proceed on

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[2] Jurisdictional App. refers to the Jurisdictional Appendix of Greg Abbott et al. (No. 17-626) (filed Oct. 27, 2017).

schedule. Texas objected to this first set of interim maps and appealed to this Court to ensure that the three-judge court's interim remedy maps would make as few changes as possible based on the court's preliminary review of Plaintiffs' likely success on the merits. *Perry v. Perez*, 565 U.S. 388, 392 (2012). This Court substantiated Texas's objection. *Id.* at 394 ("[T]he state plan serves as a starting point for the district court. . . . [A] district court should still be guided by that plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits.").[3] On remand, the three-judge panel then produced the second set of interim maps that are at issue in this case. Per this Court's orders, the second set of interim maps "maintained the status quo" except where the three-judge court found that the Plaintiffs, based on preliminary evidence, proved a likelihood of success on the merits of their chal-

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[3] Indeed, at that point in the litigation, Texas repeatedly argued to this Court that the three-judge court's preliminary findings and use of an interim map that largely followed the 2011 map would not be dispositive of the ultimate legality of the 2011 lines. *See, e.g.*, Reply Brief for Appellants at 27-28, *Perry v. Perez*, 565 U.S. 388 (2012) (No. 11-713), 2012 WL 10392, at *27-28 ("Requiring the district court to make a preliminary finding of a likelihood of success on the merits prior to ordering the alteration of the State's maps is thus consistent with this Court's precedent, and does not intrude upon the D.C. court's exclusive jurisdiction to enter final rulings on preclearance claims. In assessing whether to enter preliminary equitable relief, district courts routinely make preliminary findings before engaging in a full assessment of the merits . . . There is no reason why interim redistricting plans - which are temporary equitable remedies that apply only for a single election cycle - should be treated any differently.").

lenges. *Perez v. Texas*, 891 F. Supp. 2d 808, 816 (W.D. Tex. 2012). However, the three-judge court expressly stated that the interim maps were not intended to address or provide relief for all of the Section 2 or constitutional claims before it. *Id.* at 812. After a full trial on the merits, the three-judge court found that the evidence proved additional discriminatory defects requiring a broader remedy. *See Perez I*, 274 F. Supp. 3d at 686.

While the case before the three-judge court was proceeding, the Texas Legislature took those interim maps—which the three-judge court warned did not necessarily remedy all the defects in the enacted maps—and adopted them with no or minimal changes. Appellants' Brief at 10. The Texas Legislature chose this route as a deliberate attempt to insulate as many of its initial 2011 line-drawing choices as possible from further constitutional review. Jurisdictional App. 359a. Such gamesmanship cannot be allowed to circumvent proper and complete review of the redistricting plans based on a full trial record.

After reviewing all of the evidence, the three-judge court found that the intentional discrimination in the 2011 House and congressional maps impacted more districts than the court initially identified in its preliminary review of the proposed interim map. *See Perez v. Abbott*, 253 F. Supp. 3d 864 (W.D. Tex. 2017) (*"Perez II"*) (ruling on the 2011 congressional map); Jurisdictional App. 88a (ruling on House map). Because the 2013 maps retained the lines of the districts drawn in 2011 with discriminatory intent, and Texas offered no additional rationale for retaining those districts, the three-judge court was

entirely correct in weighing the original 2011 intent in its evaluation of the 2013 plans. Texas's arguments to the contrary contravene basic Fourteenth Amendment principles on adjudicating and remedying intentional discrimination and would lead to perverse incentives with respect to preliminary orders.[4] Texas cannot treat the Legislature's adoption of interim maps—maps in which Defendants sought to retain as many features of the 2011 plans as possible—as a complete break from the 2011 plans requiring the three-judge court to turn a blind eye to the initial reasons that the lines were drawn.

II. MAINTENANCE AND FURTHERANCE OF INTENTIONALLY DISCRIMINATORY ACTIONS VIOLATE THE FOURTEENTH AMENDMENT

The three-judge court's finding that "the adoption of the interim plans intentionally furthered and continued any discrimination that might be found in the 2011 plans and incorporated into the 2013 plans" is

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[4] This brief focuses solely on the issues that Texas has raised based on the claims of intentional vote dilution. It does not address the separate Section 2 of the Voting Rights Act results claims or the related, but distinct, *Shaw v. Reno*, 509 U.S. 630 (1993) type racial gerrymandering claims, which the three-judge court distinguished in footnote 36 of its opinion on the 2013 congressional map. *See Perez I*, 274 F. Supp. 3d at 647 n.36. Because these claims are legally and analytically distinct, it is possible to affirm the district court's ruling on the Appellees' *Shaw* and Section 2 results claims without necessarily affirming the court's rulings on intentional vote dilution, Texas's assertions to the contrary notwithstanding.

not clearly erroneous. *Perez I*, 274 F. Supp. 3d at 652 ("The Legislature in 2013 intentionally furthered and continued the existing discrimination in the plans."). Nor, as Texas suggests, was the three-judge court's consideration of the 2011 intent in evaluating the 2013 plans legally improper in any way. Intentional maintenance or furtherance of discrimination is as offensive to Fourteenth Amendment principles as an initial discriminatory act. The 2013 maps undoubtedly maintain and further features in the 2011 maps that the District Court determined were intentionally discriminatory. Under similar circumstances, this Court has found that subsequent iterations of discriminatory laws continue to carry improper intent and, therefore, must be voided. Texas bears the burden of proving that the 2013 maps are not tainted with the discriminatory intent behind the 2011 maps and it has failed to carry that burden. But, as discussed below, regardless of which party bears the burden, the District Court's factual findings were not clearly erroneous and were based on ample evidence of continuing discriminatory intent.

A. Purposeful Maintenance and Furthering of Discriminatory Intent Compel a Finding of Discriminatory Intent.

Where a subsequent act retains discriminatory features of a prior act—and particularly does so without further debate and without offering new rationales for those features—the evidence weighs heavily in favor of finding that the prior discriminatory intent infects the current act. This follows from this Court's admonition that a governmental action violates the Fourteenth Amendment when "the deci-

sionmaker, in this case a state legislature, selected *or reaffirmed* a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added).

Having found, in accordance with the factors set forth in *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), that the 2011 maps were drawn with discriminatory intent, the three-judge court appropriately viewed the 2013 maps in the context of its full legislative history. This Court has instructed lower courts to rely on the intent of predecessor discriminatory laws if subsequent acts maintain those same provisions. *See Arlington Heights*, 429 U.S. at 267-68 (instructing trial courts to consider "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes" as well as "the specific sequence of events leading up to the challenged decision" and "the legislative or administrative history").

Importantly, in noting the relevance of the historical background to the intent inquiry, the Court in *Arlington Heights* cited to *Lane*. *Id.* In *Lane*, this Court determined that Oklahoma's new registration scheme largely incorporated the discrimination of a prior intentionally discriminatory grandfather clause. 307 U.S. at 275-77. The Court stated that federal courts must ensure that the Fifteenth Amendment is enforced to "nullif[y] sophisticated as well as simple-minded modes of discrimination." *Id.* at 275. As with the scheme in *Lane*, the 2013 maps

"partake too much of the infirmity of the [2011 maps] to be able to survive." *Id.*

Similarly, in *Hunter v. Underwood*, this Court considered the issue of whether the passage of time and subsequent events had eliminated the original discriminatory intent behind a provision in Alabama's constitution that had disenfranchised persons convicted of crimes of "moral turpitude." 471 U.S. 222, 223-24 (1985). Because the core provisions of the law stood unchanged, this Court ruled that the provision retained its original discriminatory intent despite the substantial passage of time. *Id.* at 233. While Texas argues that *Hunter* is inapplicable because there was a new enactment here, unlike in *Hunter*, such facile analysis is insufficient. *Hunter* was concerned with whether a provision originally enacted with discriminatory intent remained in the law and continued to have a harmful impact. *Id.* That is the case here. While *Hunter* reserved the question of whether a distinct passage of the same law "without any impermissible motivation" would pass muster, *id.*, there is no evidence here that the 2013 maps are independent from the 2011 maps passed with impermissible motivation.

In the education context, this Court has also stressed that purposeful maintenance of discriminatory features of a law can equally offend the Fourteenth Amendment. This is particularly the case if those discriminatory features cannot be otherwise justified. In *United States v. Fordice*, this Court explained that:

> If the State perpetuates policies and practices traceable to its prior system

> that continue to have segregative effects-whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system-and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.

505 U.S. 717, 731 (1992).

Applying these factors to Texas's 2013 maps, it is clear that they still carry the prior unlawful discriminatory intent. Indeed, the exact district lines that the three-judge court found were drawn with discriminatory intent are unmodified in the 2013 maps. Nor does the record evidence provide a *sound* justification for the maintenance of those lines. Nowhere in the legislative record is there any rationale for the 2013 maps independent of a desire to maintain as much of the 2011 maps, including the discriminatory choices that escaped the three-judge court's preliminary analysis, as possible. The Legislature undertook no new analysis of the potential discriminatory impact of the maps. Indeed, every single amendment offered to address lingering constitutionality concerns was summarily rejected. *See* Jurisdictional App. 247a.

Thus no new intent or purpose can be attributed to the lines in question. The three-judge court correctly found that the Legislature rubberstamped the interim maps as part of a litigation strategy to de-

prive Plaintiffs of a complete remedy for discrimination. *Perez I*, 274 F. Supp. 3d at 649.

It is undeniably within the Legislature's prerogative to try to remedy unlawful maps to end protracted litigation. But that is not what the three-judge court found occurred. Instead, it found that the Legislature's litigation strategy was "discriminatory at its heart" and sought to insulate harmful and discriminatory choices from lawful remedies. *Id.* at 651. Under these circumstances, the three-judge court was correct in finding that the taint of the original discriminatory intent was not removed but instead "intentionally furthered."[5] *Id.* at 652.

Given these facts, Texas's reliance on *Palmer v. Thompson* is telling. Appellants' Brief at 32. Texas relies on the following statement from *Palmer*:

> Furthermore, there is an element of futility in a judicial attempt to invalidate

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[5] *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998), which Texas cites, does not help Texas. In *Cotton*, the Fifth Circuit found that a criminal disenfranchisement law was sufficiently removed from the taint of its predecessor law. 157 F.3d at 391. However, in that case, the legislature made meaningful changes to the law through a deliberative process and those changes demonstrated lack of discriminatory intent. *Id.* The Fifth Circuit also relied on the significant passage of time between the original and new law. *Id.* Here, the 2013 maps were passed quickly, without deliberation, and only two years after the original discriminatory maps were adopted. No changes were made that showed any intent other than to keep as many of the lines of the 2011 plans as possible.

> a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.

403 U.S. 217, 225 (1971). Apparently, Texas believes that this Court's jurisprudence allows a legislative body to re-pass a discriminatory law so long as it introduces some non-discriminatory pretext for the repassage.

Palmer also pre-dates this Court's modern Equal Protection jurisprudence. The Court in *Palmer* noted that "no case in this Court has held that a legislative action may violate equal protection solely because of the motivations of the men who voted for it." *Id.* at 224. In *Washington v. Davis*, this Court limited *Palmer*'s holding and disavowed any suggestion that a "close inquiry into the purpose of a challenged statute" is not necessary to constitutional adjudication. 426 U.S. 229, 244 n.11 (1976). The Court has made clear that a decision motivated at least in part by discriminatory intent can violate the Equal Protection Clause. *Arlington Heights*, 429 U.S. at 265-66. This Court has rejected such litigation strategies to launder discriminatory intent before and it should do so here.

In *McCreary County v. Am. Civil Liberties Union of Kentucky*, the Court "dispatched quickly" the defendants' argument that the purpose inquiry should be limited to the "latest news about the last in a series of governmental actions": "[T]he world is not

made brand new every morning, and the Counties are simply asking us to ignore perfectly probative evidence; they want an absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show." 545 U.S. 844, 866 (2005) (*citing Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). Moreover, the Court was able to smoke out easily statements that "were presented only as a litigation position" and that therefore had little relevance to the question of intent. *Id.* at 871. Here, the three-judge court engaged in the same close inquiry of intent: based on its familiarity with the history of the 2013 maps, it determined that any new statements of purpose were mere litigation positions and that the district lines drawn in 2011 to harm minority voters were maintained for that same reason. Those findings are not clearly erroneous.

Amici are not suggesting that the taint of prior discriminatory intent forever handcuffs a Legislature; however, the evidence presented here suggested intent to maintain discrimination rather than eliminate it. If the Texas Legislature drew maps anew, deliberated over them, and engaged in an open and democratic process, and ultimately maintained some 2011 lines while changing others, the story might be different. That is not the record before this Court.

B. Texas Has the Burden of Proving That the 2013 Maps Did Not Maintain or Further the Discriminatory Intent Behind the 2011 Maps.

For all the reasons described above, the three-judge court had sufficient evidence before it to find that the 2013 maps were infected by discriminatory purpose regardless of who bore the burden in this stage of the litigation. However, this Court's jurisprudence suggests that Texas bore the burden of proving that the 2013 maps—which maintained as many of the 2011 lines as possible at the time—did not carry the taint of the 2011 Legislature's intentional discrimination. This issue has come before this Court most often in the context of desegregation. In that context, this Court has held that "given an initially tainted policy, it is eminently reasonable to make the State bear the risk of nonpersuasion with respect to intent at some future time . . . because . . . the State has created the dispute through its own prior unlawful conduct." *Fordice*, 505 U.S. at 746–47; *see also Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 209 (1973) ("In the context of racial segregation in public education, the courts...have recognized a variety of situations in which 'fairness" and 'policy' require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated.").

Analogously, once state-sponsored discrimination is found, this Court has routinely sanctioned a burden-shifting framework that requires a State actor to prove that an act would have been taken absent that discrimination: "Once racial discrimination is shown

to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter*, 471 U.S. at 228 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)); *see also N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 221 (4th Cir. 2016), *cert. denied sub nom. North Carolina v. N. Carolina State Conference of NAACP*, 137 S. Ct. 1399 (2017). That burden-shifting framework should not be changed where a legislature does nothing but rubberstamp prior discriminatory provisions in a new package.

III. INTENTIONAL DISCRIMINATION REQUIRES A COMPLETE REMEDY

The three-judge court's holding is correct for another related reason: anything less than the three-judge court's finding that the discriminatory lines maintained without change in the 2013 maps must be remediated would deprive the Plaintiffs who challenged the initial 2011 maps of the full remedy to which they are entitled.

A law passed with discriminatory intent has "no legitimacy at all under our Constitution." *City of Richmond v. United States*, 422 U.S. 358, 378 (1975). And the racial discrimination of that law must "be eliminated root and branch." *Green*, 391 U.S. at 437–38. The benchmark for any remedy for unconstitutional discrimination is whether it "place[s] the victims of discrimination in 'the position they would have occupied in the absence of discrimination.'" *United States v. Virginia*, 518 U.S. 515, 547 (1996)

(quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)).

The legislative choices underlying an intentionally discriminatory law are owed no deference whatsoever. *See Arlington Heights*, 429 U.S. at 265-66. At the time of the interim maps, the three-judge court had not fully adjudicated the question of which lines were infected with the Legislature's discriminatory purpose. When it completed its analysis based on the fuller record presented at trial, it determined more districts were impacted by that purpose than it originally identified at the time that it drew the interim maps under the pressure of impending election deadlines. Therefore, the legislative choices that the three-judge court left in place in the interim maps out of deference were not entitled to any such deference in designing a permanent remedy.

Where a court finds that the state has acted with unconstitutional discriminatory intent, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). Under the 2013 plans, the three-judge court determined that many purposeful discriminatory choices from the 2011 plans continued to injure Plaintiffs and dilute their voting strength. *See Perez II*, 253 F. Supp. 3d at 875; *Perez I*, 274 F. Supp. 3d at 652.

That *some* of the discriminatory choices were identified and eliminated in the interim maps is not sufficient to right these wrongs. *See Dillard v. Baldwin County Comm'n*, 694 F. Supp. 836, 843 (M.D.

Ala. 1988), *aff'd* 862 F.2d 878 (11th Cir. 1988) (rejecting a state-proposed remedy that was "still a product of the legislature's intentional racial discrimination" and holding that "deleting just one feature of [a discriminatory] at-large system would [not] delete the invidious taint of this broad legislative scheme"); *N. Carolina State Conference of NAACP*, 831 F.3d at 240 ("But, even if the State were able to demonstrate that the amendment lessens the discriminatory effect of the photo ID requirement, it would not relieve us of our obligation to grant a complete remedy in this case. That remedy must reflect our finding that the challenged provisions were motivated by an impermissible discriminatory intent and must ensure that those provisions do not impose any lingering burden on African American voters.").

The three-judge court was correct to order a complete remedy for the intentional harms to minorities perpetuated by the 2013 plans. Anything less would not "place the victims of [Texas's] discrimination in the position they would have occupied in the absence of discrimination." *See Virginia*, 518 U.S. at 565; *see also City of Port Arthur v. United States*, 459 U.S. 159, 168 (1982) (holding that "in light of the prior findings of discriminatory purpose," the district court's elimination of the majority vote requirement in the proposed remedial plan "was a reasonable hedge against the possibility that the [remedial] scheme contained a purposefully discriminatory element"); *Louisiana*, 380 U.S. at 154-155 (enjoining an unconstitutional literacy test and a new subsequently enacted test because, even if the new test was nondiscriminatory, it perpetuated the discrimi-

natory burdens placed on Black voters by the prior test).

IV. AN INTERIM REMEDIAL ORDER DOES NOT SET THE FINAL CONTOURS OF RELIEF

Texas's argument regarding the legal significance of its legislature adopting the three-judge court's interim plans as its enacted plans misconstrues the nature of preliminary relief. Texas argues: "[O]ne would have thought there was one reasonably safe course available to bring [redistricting litigation] to an end—namely, enacting the three-judge court's remedial redistricting plan as the legislature's own." Appellants' Brief at 1. That might be true of a *final* remedial plan but it is certainly not true of a preliminary remedy at an early stage in the case.

It is well established that such preliminary relief does not and could not settle the final rights of the parties. "The purpose of such interim equitable relief is not to conclusively determine the rights of the parties but to balance the equities as the litigation moves forward." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam) (internal citations removed); *see also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 317 (1985) ("[A]ny conclusions reached at the preliminary injunction stage are subject to revision[.]"); *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Although Texas argues that it "took the court at its word that those maps complied with the Constitution and the VRA," Appellants' Brief at 1, the court did not make that assertion. To the contrary, the order warned both parties that the map did not

represent "a final judgment on the merits as to any claim or defense in this case." Jurisdictional App. 315a.

Thus, Texas's description of the three-judge court's ruling, which drives many of its legal arguments, is fatally flawed:

> According to the district court, its own maps were infected with the "taint of discriminatory intent"—a taint that the Legislature (but apparently not the court) was obligated to "remove" if it wanted to adopt those maps as state law rather than just abide by them as a judicial decree.

Appellants' Brief at 1. The three-judge court eventually concluded that its interim and preliminary order did not identify all of the discriminatory choices that the Texas Legislature engaged in. If the Texas Legislature had not enacted the 2013 plan into law, the three-judge court would assuredly have altered its own remedial map to remove those discriminatory choices in its final remedial order. Thus, the three-judge court is not imposing any double standard on Texas but merely recognizing its duty to alter interim relief based on final merits findings. That is how interim and final relief work.

Texas's argument, if it prevailed, would profoundly disrupt the incentives for both courts and parties at the interim stages of litigation. This Court has urged district courts, in fashioning interim remedial relief in redistricting matters, to defer as much as possible to state legislative policy choices and re-

quire plaintiffs to meet their burden of proving likelihood of success on the merits of a challenge to alter those choices. *See Perry*, 565 U.S. at 393-94. Yet, ironically, if Texas's position prevails, three-judge courts may often skew their results to provide broader relief at the preliminary stage in order to maintain their discretion to fashion appropriate final relief. That is because Texas's argument creates a one-way ratchet where awarding additional relief at the final stage may be exceedingly difficult. So long as the state accepts the interim relief as its own, the court will lose its authority to determine that more relief is necessary after review of a full record. This approach, while attractive to Texas at this moment to protect this map, is harmful to the process overall. It creates incentives for district courts to provide greater preliminary relief with the knowledge that such relief can be scaled back but may impose a ceiling. Such incentives run directly counter to this Court's admonition that "[r]edistricting is 'primarily the duty and responsibility of the State'" and courts should be reticent to disturb state choices. *Id.* at 392 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

This strategy will also disrupt the incentives for negotiation at the interim stage. Interim relief in elections-related cases is often urgent, requiring quick and decisive action in time for relief to be put into place prior to an upcoming election. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1 (2006). These interim plans are often negotiated compromises among the parties. Indeed, this plan was not drawn by the three-judge court but by Defendants and some Plaintiff groups. *Perez v. Texas*, 891 F. Supp. 2d at 825. Negotiation and compromise among the parties at

the interim stage helps preserve judicial resources and ensure timely relief. It should be encouraged.

But Texas's strategy, if successful, will prevent plaintiffs from engaging in good-faith compromise in the interest of agreed upon interim relief if that means they are creating obstacles to complete relief at the final stage. Moreover, courts will be hesitant to accept a compromise plan if it may prevent them from awarding full relief in the future. This is particularly true if, as was the case here, only some plaintiffs agree to the compromise plan. If Texas succeeds, courts would be right to reject such compromise plans that may trade away the rights of other plaintiffs without full adjudication. The end result of Texas's legal theory is that parties will be seeking this Court's interference at the interim stage of many more redistricting matters.

Texas's legal theory of the case fundamentally misunderstands the role of interim relief in the judicial process. Moreover, the incentive structure it would create is unnecessary and harmful to the ability of courts and parties to fashion interim relief. It should be rejected.

CONCLUSION

For the foregoing reasons, the decision of the three-judge court should be affirmed.

Respectfully submitted,

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Nos. 17-586, 17-626

In the Supreme Court of the United States

GREG ABBOTT, GOVERNOR OF TEXAS, *et al.*,

Appellants,

v.

SHANNON PEREZ, *et al.*,

Appellees.

On Appeal to the United States District Court for the Western District of Texas

BRIEF FOR COMMON CAUSE AND THE VOTING RIGHTS INSTITUTE AS *AMICI CURIAE* SUPPORTING APPELLEES

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INTEREST OF THE *AMICI CURIAE*[1]

Founded in 1970, *amicus* Common Cause is a nonprofit, nonpartisan organization dedicated to protecting and strengthening democracy and the democratic process. Its membership now stands at 1.1 million people. Common Cause has, among other things, led the movement to lower the voting age to 18; and spearheaded the passage of freedom-of-information laws, government ethics laws, and laws to limit the corrupting influence of money in politics. Gerrymandering is an issue of longstanding interest to Common Cause at the national level and in its network of 35 state organizations.

Amicus Voting Rights Institute (VRI) is a first-of-its-kind legal institute established to help enforce and protect the rights of American voters. A joint project of Georgetown University Law Center, the Campaign Legal Center, and the American Constitution Society, VRI assists attorneys, expert witnesses, law students, and the public combat discriminatory voting practices across the country. It offers opportunities for students, recent graduates, and fellows to engage in litigation and policy work in the field of voting rights and to educate attorneys about the skills and best practices of voting rights advocates. It also recruits and trains expert witnesses to assist in litigation development and presentation; promotes increased local and national focus on voting rights

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have submitted blanket consents to the filing of *amicus* briefs in this case.

through events, publications and the development of web-based tools; and provides opportunities and platforms for research on voting rights.

This case involves the legality of voting districts that the Texas Legislature originally created in 2011. After the district court invalidated those districts as discriminatory, the court in 2012 permitted use of some of the districts on an interim basis, expressly noting that its interim review had been limited and was subject to revision. In 2013, the Texas Legislature re-enacted the same districts—those originally held to be discriminatory—without change. Texas now argues, in part, that adoption of the district court's interim plan in 2012 effectively insulates the 2013 plan from further review. Because this contention threatens to subject Texas residents (and, if Texas's theory prevails, residents of other States) to discriminatory voting regimes, and because *amici* have considerable experience addressing issues that relate to redistricting, *amici* submit this brief to assist the Court in the resolution of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellees show in their briefs that the challenged Texas districts were created with a discriminatory purpose. That conclusion plainly is correct on the record here: The Texas Legislature knew what it was doing and intended the result when it drew districts that minimized minority voting strength.

In this brief, we focus on two particular, related arguments that Texas and the United States advance in defense of the challenged 2013 redistricting plans in an effort to avoid a conventional—and, from

their perspective, fatal—inquiry into legislative motive.[2] First, Texas maintains that the challenged plans here were "court-drawn" or "court imposed" (see, *e.g.*, Texas Br. i; see also U.S. Br. 24) and that, necessarily, the Legislature's adoption of a plan that had been validated by a federal court could not have been improper. And second, Texas insists that the improper purpose that initially motivated adoption of Plan H283 in 2011 was somehow laundered out of Plan H358 when the Legislature created *identical* districts after the district court's interim approval of those districts in 2012.

These arguments are wrong. The districts challenged here were discriminatory when the Texas Legislature created them in 2011. They had not magically lost their discriminatory purpose when the Legislature re-enacted *the very same districts* two years later.

A. Texas is incorrect when it maintains that the district court validated the challenged districts, and insulated them from review, when it permitted their use in the 2012 interim plan. It is fundamental that courts use different standards when issuing preliminary or interim relief than they do when making a final determination on the merits. The need for expeditious review means that a preliminary ruling is issued on a limited record and with less than full consideration; such a ruling is characterized by what courts have called "its for-the-time-beingness." The

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[2] The arguments in this brief apply both to the Texas House districts incorporated in Plan H358 and to the congressional districts incorporated in Plan C235 that remained unchanged from Texas's 2011 state house and congressional plans. For simplicity's sake, the brief principally discusses Plan H358.

district court here emphasized that is just how it regarded its interim ruling, which it repeatedly said was not definitive and was subject to revision. That ruling does not establish the ultimate validity of the challenged districts, and Texas could not reasonably have relied on it for that purpose.

B. The interim ruling also does not launder the Texas Legislature's discriminatory purpose out of the case. Texas now maintains that it adopted districts included in the interim plan simply to bring an expeditious end to the redistricting litigation. But Texas's stated motive is not the end of the matter: It remains the Court's duty to determine the Legislature's *actual* intent when it chose to re-enact districts that had been held to be the product of a discriminatory purpose. And here, *all* of the usual indicia of legislative intent—including the history, context, and prior judicial constructions of the legislative language—support the district court's finding that the Texas Legislature adopted the 2013 plan with a discriminatory purpose.

ARGUMENT

A. The Texas Legislature initially drew the districts at issue here with a discriminatory purpose.

Appellees address the history of the Texas plan at issue in this case in detail (Appellees' Br. 2-25[3]), and there is no need to repeat that presentation here. But for purposes of the arguments addressed in this brief, one element of the record warrants special emphasis: the district court's findings regarding the

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[3] References here to "Appellees' Brief" are to appellees' brief relating to the State House districts.

discriminatory intent that underlay the initial drawing in 2011 of the Texas House districts at issue here. Because it is the position of Texas and the United States that a plan using those same boundaries was drawn with a benign intent just two years later, it is helpful to bear in mind the specific findings that led the district court to hold those districts to have been constructed with the specific purpose of disadvantaging minority voters.

1. In Nueces County, the district court found that the cartographers acted "in bad faith" when they eliminated HD33 as a Hispanic opportunity district. H.J.S. App. 133a. The court found that it was "undisputed that Nueces County had two benchmark Latino opportunity districts" before the 2010 redistricting cycle. *Ibid.* Legislators had "three options" for how to district Nueces County: "(1) draw one 'performing' Hispanic district and one not; (2) draw two equally Hispanic districts, which may not perform reliably; or (3) see if both Latino opportunity districts could be preserved by splitting county lines." *Id.* at 127a.[4] The mapmakers pursued the first option, despite never "seriously look[ing] at whether § 2 [of the Voting Rights Act ("VRA")] might require two opportunity districts in Nueces County." *Id.* at 127a n.22. Instead, they sought to "offset" the loss of HD33 as an opportunity district by adding more Latinos to

[4] The County Line Rule is a Texas constitutional requirement that legislative districts "preserve whole counties when population mandates permit." Tex. Const. art. III § 26. To the extent the Texas Constitution conflicts with the Voting Rights Act, however, federal law controls.

HD90 and HD148—districts that were already electing minority candidates of choice. *Ibid.*[5]

The court found that the "redistricters knew" that these two districts "were already ability districts, and thus that increasing their SSVR did not create any 'new' ability district to offset the loss of HD33." H.J.S. App. 135a. Hence, the court found that the true motive was "to intentionally dilute Latino voting strength by * * * allowing redistricting leadership to claim that they were complying with the VRA despite eliminating HD33 and creating no new opportunity or ability districts." *Id.* at 137a.

The district court also found "evidence that the mapdrawers (including specifically Rep. Hunter) racially gerrymandered the districts that remained in Nueces County to further undermine Latino voting strength." H.J.S. App. 136a. The court noted that "[t]here are ten precinct splits along the HD32/HD34 border" from which the court inferred that "mapdrawers were likely using race to assign population since accurate political data is not available below the precinct level." *Ibid.* The goal of these splits, according to the district court, was to "intentionally pack[] Hispanic voters into HD32 to minimize their number and influence in HD34" to protect the Republican incumbent. *Ibid.* The court also found evidence that the mapdrawers "targeted low turnout

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[5] The district court also found that the mapmakers intentionally relied on Spanish Surname Voter Registration ("SSVR") as a measure of the relevant Latino population in Nueces County, even though they knew that Hispanic Citizen Voting Age Population ("HCVAP") was the more appropriate measure, because "SSVR was lower (and lower than 50%), and it allowed them to argue that mathematically, two SSVR-majority districts could not be drawn." H.J.S. App 134a.

minority areas" for inclusion in HD34 to protect the Republican incumbent. *Ibid.* Finally, the court found evidence that the mapmakers intentionally overpopulated HD32 (and underpopulated HD34), without a legitimate justification for doing so. *Ibid.* All of these findings contributed to the conclusion that the Texas Legislature had engaged in intentional vote dilution.

2. The district court found that in Dallas County, the mapdrawers intended to "dilute minority voting strength to protect a Republican incumbent in HD105 by intentionally making the district more Anglo." H.J.S. App. 170a. The court found that the "Anglo population decreased by 198,000 in Dallas County" even while the population of Dallas County as a whole grew by 350,000. *Id.* at 261a. As such, the mapmakers knew that two of the three districts in Dallas County would have to be minority districts. See *id.* at 171a. As one advisor to the mapmakers explained, however, it might "get 'worse' because they might have to draw a third Latino district, which would mean the loss of a third Republican seat." *Ibid.* But instead of "exploring whether any additional minority districts could be drawn or maintained to recognize the population growth," the mapmakers decided to pack as many Latino voters as possible into the two minority districts and therefore "eliminated districts that were on track to perform for minority voters." *Ibid.*

In fact, one of the redistricters "admitted to splitting precincts to put the Hispanic population into HD104 and HD103 and the Anglo population in HD105." H.J.S. App. 171a. Although this legislator claimed that he took this step to comply with the VRA, the district court found "that this was yet another example of mapdrawers using superficial com-

pliance with the VRA to dilute minority voting strength rather than enhancing it." *Ibid.* By doing so, the Legislature made it less likely that Latinos would elect their candidate of choice in HD105. *Id.* at 261a & n.35. Hence, the district court found that the Legislature's "true motive was to dilute Latino voting strength in west Dallas County by unnecessarily placing Latinos" into two already Latino districts to make HD105 more Anglo, and more strongly protective of the incumbent Republican. *Id.* at 172a. The district court concluded that this strategy was intentional discrimination in violation of the VRA.

3. The mapmakers split the City of Killeen in Bell County, a paradigmatic community of interest, between two districts "to ensure that" those districts "remained Anglo-majority, and would reelect Republican incumbents." H.J.S. App. 183a. The district court found that "the evidence does indicate that mapdrawers * * * intentionally racially gerrymandered the districts to dilute the minority vote by moving minority population out of HD54 and moving Anglo population in." *Id.* at 181a. Thus, the court concluded that mapmakers swapped minority and Anglo communities to make "it more difficult for minority voters in HD54 to elect their candidate of choice." *Ibid.*

The court reached this conclusion because it found the reasons offered by the mapmaker who split Killeen "not credible." H.J.S. App. 182a-183a. That representative testified that he believed some areas in Bell County had more in common with a neighboring county. *Id.* at 182a. The court, however, rejected that reasoning as "pretextual" cover for his intent to "crack[] and dilut[e] the minority vote to ensure Anglo control over both districts." *Id.* at 181a. Specifi-

cally, although the mapmaker opposed an alternative map that would have kept Killeen whole because it had a "land bridge" that connected Killeen to other communities, "Plan H283 includes land bridges in other areas and he voted for it." *Id.* at 182a-183a. The court concluded that the legislator was motivated by the knowledge that "a minority coalition district [such as Killeen] would not likely have enough Republicans to re-elect him." *Id.* at 182a.

Accordingly, the background of the current controversy is clear and, for present purposes, essentially undisputed. The Texas Legislature drew the particular districts that we address for the specific, race-conscious purpose of disadvantaging Latino voters. The State's arguments to the contrary, the district court found, were pretextual. The question now is whether these findings of improper intent have any bearing on the Texas Legislature's motive in placing the same districts in a plan it enacted two years later.

B. Texas's attempt to equate preliminary findings with a final decision on the merits is unavailing.

In defending districts that initially were drawn for these manifestly improper purposes, Texas insists that the district lines used in Plan H358 must be valid because the district court approved the same lines in the interim plan it set in 2012. As Texas would have it, that approval means that the challenged districts should be treated as court-drawn, so that the district court, in the decision below, found that "*its own maps* were infected with the 'taint of discrimina-

tory intent.'" Texas Br. 1 (emphasis in original).[6] This contention is central to the State's case; as appellees note (Appellees' Br. 1), Texas repeats the assertion that the challenged plan is "court-drawn" or "court imposed" at least eleven times throughout its brief.

This facially improbable contention, however, is wrong. The district court's avowedly preliminary and interim approval of the challenged districts—a product of exigent circumstances and severe time constraints—was not intended to be, and could not reasonably have been taken by Texas legislators to have been intended as, an endorsement of the ultimate validity of these districts. In fact, Texas's novel theory disregards not only the plain meaning of "preliminary" and "interim," but also this Court's longstanding precedent and the Federal Rules' established procedures for combining preliminary and final relief. Plan H358 was not the district court's plan; it was the Texas Legislature's plan. The reality is that all the districts at issue were drawn by the Legislature, some in 2011 and the rest in 2013.

1. A preliminary injunction is not a decision on the merits.

a. Texas's argument is premised on the assumption that the district court's preliminary, interim plan reflects the court's judgment that the districts included in that plan express an ultimate judgment that these districts are valid. But that plainly is not so. As this Court has long recognized, "the findings of fact and conclusions of law made by a court granting

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[6] The United States is more restrained in its characterizations, but does refer to the plan as the court's "own." U.S. Br. 24.

a preliminary injunction are not binding at trial on the merits." *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981). Although district courts "should make the findings of fact and conclusions of law that are appropriate to the interlocutory proceeding," these findings must not be treated as a "decision * * * on the merits." *Public Serv. Comm'n of Wis.* v. *Wis. Tel. Co.*, 289 U.S. 67, 71 (1933).

It is *because* "the necessity for an expeditious resolution often means that the injunction is issued on a procedure less stringent than that which prevails at the subsequent trial" that preliminary injunctions are not final. *Thornburgh* v. *American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 755-756 (1986), *overruled on other grounds by Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833 (1992). On later review, a court may reverse some or all of its initial findings based on a more fully developed record and greater time for deliberation. Thus, "any conclusions reached at the preliminary injunction stage are subject to revision." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 317 (1985) (citing *Camenisch*, 451 U.S. at 395).

This principle has never been in doubt. As recently as last Term, the Court affirmed that "[c]rafting a preliminary injunction is an exercise of discretion and judgment," the purpose of which "is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Trump* v. *International Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (internal citations omitted). The Court has made clear that the same standard governs a district court's decision to accept or depart from elements of a State's pro-

posed redistricting plan when "drafting an interim plan." *Perry* v. *Perez*, 132 S. Ct. 934, 941-942 (2012).

b. Lower courts have consistently recognized the "significant differences between a preliminary injunction and a permanent injunction or other final disposition on the merits." *Zen Music Festivals, L.L.C.* v. *Stewart*, 72 F. App'x 168, 170 (5th Cir. 2003); see also *Ben. Pension Tr.* v. *United States*, 888 F.2d 1111, 1114 (6th Cir. 1989) (collecting cases). These holdings have special relevance here: they drive home what the district court in this case meant by its interim ruling—and that Texas surely recognized, both at that time and when it adopted Plan H358, that the interim ruling was *not* a definitive resolution of the propriety of the districts approved by the district court for temporary use in 2012.

Thus, as Judge Jerome Frank wrote for the Second Circuit more than 60 years ago, a "preliminary injunction * * * is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, [and] characterized by its for-the-time-beingness." *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953); see also 42 Am. Jur. 2d *Injunctions* § 276 (2018) (explaining that preliminary injunctions "by their very nature are interlocutory, tentative, and impermanent").

Accordingly, preliminary findings of fact and conclusions of law have "no binding effect whatsoever." *Clark* v. *K-Mart Corp.*, 979 F.2d 965, 969 (3d Cir. 1992) (citing *Camenisch*, 451 U.S. at 395-396)); see also *Industrial Bank of Wash.* v. *Tobriner*, 405 F.2d 1321, 1324 (D.C. Cir. 1968) (explaining that such findings "should not be regarded as binding in further proceedings"). This is because such proceedings

are "based upon procedures that are less formal and evidence that is less complete than in a full trial." *Technical Publ'g Co.* v. *Lebhar-Friedman, Inc.*, 729 F.2d 1136, 1139 (7th Cir. 1984).

2. The district court emphasized the limited nature of its holding.

a. That rule governs in this case. Facing extreme limits on its ability to conduct a full review, the district court repeatedly "emphasize[d] the preliminary and temporary nature" of the 2012 interim map. H.J.S. App. 314a. Contrary to Texas's representations, the district court stressed that "nothing in this opinion reflects this Court's final determination of *any* legal or factual matters." *Id.* 303a (emphasis added).

Little wonder why; the court was operating under "severe time constraints." H.J.S. App. 356a. With barely more than a month to develop its plan, the court was forced to make preliminary findings on an incomplete and underdeveloped record.[7] Due to the

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[7] The resolution of complex redistricting cases almost always takes more time than the district court was able to devote to consideration of the interim challenge in this case. The average time from trial to disposition of a redistricting case in the Fifth Circuit is five months. *See, e.g.*, *Rodriguez* v. *Harris Cty.*, 964 F. Supp. 2d 686 (S.D. Tex 2013) (8.5 months from trial to conclusion that there was no Section 2 violation); *Fairley* v. *City of Hattiesburg*, 122 F. Supp. 3d 553 (S.D. Miss. 2015) (9.5 months from trial to conclusion that there was no Section 2 violation); *Fabela* v. *City of Farmers Branch*, No. 3:10-CV-1425-D (N.D. Tex. Jan. 1, 2013) (6 months from trial to implementation of new plan to remedy Section 2 violations); *Hall* v. *Louisiana*, 108 F. Supp. 3d 119 (M.D. La. 2015) (6.5 months from trial to conclusion that there was no Section 2 violation); *Terrebonne Par. Branch NAACP* v. *Jindal*, 274 F. Supp. 3d 395 (M.D. La. 2017) (3.5 months from trial to conclusion that there was a Section 2

"exigent circumstances created by the need for timely 2012 primaries and general elections in Texas" (*id.* at 303a), the court was not able to—and indeed, did not try to—adjudicate the merits. The court simply did the best that it could, while "warn[ing] repeatedly that its determinations could change after a full trial on the merits." *Id.* at 356a n.42. This is, indeed, a ruling characterized by its "for-the-time-being-ness."

b. Preliminary injunctions are preliminary for this very reason. Courts must make fast determinations on relatively little information. Faced with such record and time constraints, "[i]t is universally true that courts are more willing to grant permanent injunctions than preliminary injunctions." Douglas A. Laycock, *The Death of the Irreparable Injury Rule*, 103 Harv. L. Rev. 687, 731 (1990). And "[p]reliminary injunctions are * * * often denied in substantive areas where all injury is irreparable and permanent injunctions are routine, such as * * * civil rights and civil liberties." *Id.* at 732 (footnote omitted). As remedies scholars have explained, "[t]he reasons a court may be cautious in awarding preliminary relief are clear. The court must act without a full trial, sometimes with only sketchy motion papers and affidavits to guide its decision." *Id.* at 728; see also Linda J. Silberman, *Injunctions by the Numbers: Less*

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violation, with the issue of a remedial map still pending); *Benavidez* v. *Irving Indep. Sch. Dist.*, No. 3:13-CV-0087-D (N.D. Tex. Oct. 20, 2014) (2.5 months from trial to implementation of a new plan to remedy Section 2 violation); *York* v. *City of St. Gabriel*, 89 F. Supp. 3d 843 (M.D. La. 2015) (2 months from trial to conclusion that there was no Section 2 violation); *Patino* v. *City of Pasenda*, 230 F. Supp. 3d 667 (S.D. Tex. 2017) (1 month from trial to implementation of interim map to remedy Section 2 violation).

Than the Sum of Its Parts, 63 Chi.-Kent L. Rev. 279, 300-301 (1987) ("[B]ecause of the preliminary nature of the relief and the expedited nature of the proceeding, there is often not a fully developed factual record. The district judge is often acting more on hunch, probability, and speculation than he would be in a full-scale trial for permanent relief."). Therefore, courts rarely grant full injunctive relief at the preliminary stage.

It is thus no surprise that the district court granted only partial relief here. Acting under severe record and time constraints—and mindful of the cost to the State—the court invalidated only some of the challenged districts. Later, with the full record in hand and time for reflection, the court invalidated additional districts.

This again should come as no surprise to Texas. Courts reverse their determinations between the preliminary and final stages of litigation *all the time*. District courts frequently deny preliminary relief only to grant permanent relief,[8] and vice versa.[9] Appel-

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[8] See, *e.g.*, *United Motorcoach Ass'n, Inc.* v. *City of Austin*, 851 F.3d 489, 492 (5th Cir. 2017) (discussing a district court permanently enjoining the enforcement of a city regulation, despite denial of preliminary relief); *Public Interest Research Grp.* v. *Powell Duffryn Terminals Inc.*, 913 F.2d 64, 69-70 (3d Cir. 1990) (discussing a district court permanently enjoining the defendant from violating a Clean Water Act permit, despite denial of preliminary relief); *Nalpac, Ltd.* v. *Corning Glass Works*, 784 F.2d 752, 753-754 (6th Cir. 1986) (discussing a district court permanently enjoining the defendant from use of a trademark, despite denial of preliminary relief); *Bynes* v. *Toll*, 512 F.2d 252, 253 (2d Cir. 1975) (discussing a district court permanently enjoining the defendant-university from enforcing a discriminatory residency agreement, despite denial of preliminary relief).

late courts likewise reverse preliminary injunctions only to later affirm permanent ones.[10] Preliminary relief is, by its very nature, temporary. There is nothing strange or untoward about the district court revising its initial determinations in light of a finished record and time for considered judgment. Texas cannot claim that its plans were upset by an ordinary reversal of fortunes, of the sort litigants routinely face.

c. Texas unsuccessfully attempts to shrink the gap between preliminary and final relief by suggesting that the district court applied "a standard uniquely favorable to plaintiffs." Reply Supporting H.J.S. 6 (emphasis omitted). This argument misunderstands the governing standard.

That standard is pro "status quo" (42 Am. Jur. 2d *Injunctions* § 9), not pro-plaintiff. A preliminary injunction is an "extraordinary remedy" (*Winter* v. *NRDC*, 555 U.S. 7, 24 (2008)), enacted "merely to preserve the relative positions of the parties until a

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[9] See, *e.g.*, *Sole* v. *Wyner*, 551 U.S. 74, 77 (2007) (addressing whether "a plaintiff who gains a preliminary injunction after an abbreviated hearing, but is denied a permanent injunction after a dispositive adjudication on the merits, qualif[ies] as a 'prevailing party'" for attorneys' fees purposes); *Common Cause/Georgia* v. *Billups*, 554 F.3d 1340, 1347-1348 (11th Cir. 2009) (denying a permanent injunction in a voter ID law case, despite the issuance of preliminary relief).

[10] *Compare Los Angeles Mem'l Coliseum Comm'n* v. *National Football League*, 634 F.2d 1197, 1204 (9th Cir. 1980) (reversing a preliminary injunction, because plaintiffs had not shown a likelihood of irreparable injury), *with Los Angeles Mem'l Coliseum Comm'n* v. *National Football League*, 726 F.2d 1381, 1401 (9th Cir. 1984) (affirming a permanent injunction in the same case, because plaintiffs had shown irreparable injury during the trial).

trial on the merits can be held." *Camenisch*, 451 U.S. at 395. The purpose of the standard is to "balance the equities" (*Trump*, 137 S. Ct. at 2087) and preserve the litigating positions of the parties for trial. For that reason, "[a]n injunction is considered an extraordinary remedy that should be exercised sparingly and cautiously." 42 Am. Jur. 2d *Injunctions* § 17 (footnotes omitted). Here, that standard militated in favor of the court preserving for interim use the district boundaries initially drawn by the Texas Legislature.

Texas's arguments thus misstate the standard. It is no surprise that the district court denied the plaintiffs full relief on a slim record and under extreme time pressure. Texas cannot shield its map from further constitutional review in reliance on relief that was, by its very nature, ephemeral and extraordinary.

3. Texas cannot evade review by relying on the court's interim findings.

Against this background, Texas could not reasonably have believed that the district court's interim findings established the ultimate validity of the districts incorporated in the 2012 plan. The State's current suggestion that it expected use of districts permitted by the interim plan to end the redistricting litigation therefore simply is not plausible.

a. Courts have long cautioned litigants against placing too much faith in preliminary findings. In circumstances generally similar to those here, the Second Circuit recently chided a state university for relying on statements in an order granting preliminary relief. As the Second Circuit explained:

> [The university]—or certainly its able counsel—surely knew the risks of such reliance. "A decision on a preliminary injunction is, in effect, only a prediction about the merits of the case," thus, "findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding," and "do not preclude reexamination of the merits at a subsequent trial."

Biediger v. *Quinnipiac Univ.*, 691 F.3d 85, 107 (2d Cir. 2012) (quoting *Morris* v. *Hoffa*, 361 F.3d 177, 189 (3d Cir. 2004); *Camenisch*, 451 U.S. at 395; and *Irish Lesbian & Gay Org.* v. *Giuliani*, 143 F.3d 638, 644 (2d Cir.1998)).

Courts have likewise rejected similar reliance arguments by patent litigants. Defendants in a recent pharmaceutical case contended that they reasonably relied on the court's denial of preliminary relief in issuing a competing product. The court rejected this argument: "Although Defendants did not launch their generic product until after the preliminary injunction was denied, the preliminary injunction was, by definition, *preliminary* and not a final ruling on the validity of the * * * patent." *Sanofi-Aventis Deutschland GmbH* v. *Glenmark Pharms. Inc.*, 821 F. Supp. 2d 681, 695 (D.N.J. 2011), *aff'd and remanded*, 748 F.3d 1354 (Fed. Cir. 2014).

b. Appellate courts have similarly cautioned district courts against overreliance on their own preliminary findings.

As the Seventh Circuit has explained, "exclusive[]" reliance on preliminary findings "can be a risky approach. A court must be cautious in adopting findings and conclusions from the preliminary in-

junction stage in ruling on a motion for summary judgment." *Communications Maint., Inc.* v. *Motorola, Inc.*, 761 F.2d 1202, 1205 (7th Cir. 1985); see also *Lac Du Flambeau Band of Lake Superior Chippewa Indians* v. *Stop Treaty Abuse-Wis., Inc.*, 991 F.2d 1249, 1258 (7th Cir. 1993) ("[W]e have advised district courts to be cautious in [subsequently] adopting conclusions of law made in ruling on a preliminary injunction because the posture of the case at that time inevitably entails incomplete evidentiary materials and hurried consideration of the issues.").

Appellate courts thus frequently reverse grants of summary judgment where the district court improperly relied on denial of preliminary relief to justify summary judgment. For example, the Sixth Circuit reversed where the district court concluded that the "magistrate's recommendation denying the appellant's motion for a preliminary injunction, as adopted by the district court, was dispositive of the summary judgment motion." *William G. Wilcox, D.O., P.C. Employees' Defined Benefit Pension Tr.* v. *United States*, 888 F.2d 1111, 1113 (6th Cir. 1989). As the court explained, "a trial court's disposition of the substantive issues joined on a motion for extraordinary relief is not dispositive of those substantive issues on the merits." *Id.* at 1114. Other appellate courts agree,[11] as do the leading treatises. See,

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[11] See, *e.g.*, *Golden State Transit Corp.* v. *City of Los Angeles*, 754 F.2d 830, 832 n.3 (9th Cir.1985) ("As a general rule, decisions on preliminary injunctions do not constitute law of the case and 'parties are free to litigate the merits.'") (quoting *City of Anaheim* v. *Duncan*, 658 F.2d 1326, 1328 n.2 (9th Cir. 1981), *rev'd on other grounds*, 475 U.S. 608 (1986)); *Berrigan* v. *Sigler*, 499 F.2d 514, 518 (D.C. Cir. 1974) ("The decision of a trial or appellate court whether to grant or deny a preliminary

e.g., 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4478 (1981) ("Rulings that simply deny extraordinary relief for want of a clear and strong showing on the merits, or that are avowedly preliminary or tentative, do not trigger law of the case consequences.").

4. There is a procedure for combining preliminary hearings with a decision on the merits, but it was not used here.

Texas's reliance on preliminary findings is not only wrong; it ignores an established procedure for combining preliminary relief with a final decision on the merits. Neither the district court nor Texas pursued this procedure here.

Federal Rule of Civil Procedure 65(a)(2) sets out a process for combining preliminary and final relief: "Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing." Fed. R. Civ. P. 65(a)(2).

This procedure requires advance notice to the parties. As this Court has explained:

> Before such an order may issue, however, the courts have commonly required that "the parties should normally receive clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time

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injunction * * * does not limit or preclude the parties from litigating the merits * * * . [S]uch rulings [do] not preclude the district court, nor should they dissuade us, from taking a fresh look.") (footnotes omitted).

> which will still afford the parties a full opportunity to present their respective cases.

Camenisch, 451 U.S. at 395 (quoting *Pughsley* v. *3750 Lake Shore Drive Coop. Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972)).

If the Rule 65(a)(2) process is not specifically invoked, it is generally improper to adopt findings from a preliminary hearing at the merits stage without additional explanation. See, *e.g.*, *Sanchez* v. *Esso Standard Oil Co.*, 572 F.3d 1, 15 (1st Cir. 2009). "When a trial court 'disposes of a case on the merits after a preliminary-injunction hearing without expressly ordering consolidation * * * it is likely that one or more of the parties will not [have] present[ed] their entire case at [the] unconsolidated preliminary-injunction hearing.' Therefore, it is ordinarily improper to decide a case solely on such a basis." *Ibid.* (quoting 11A C. Wright, A. Miller, & E. Kane, *Federal Practice and Procedure* § 2950 (2009)).

Accordingly, the controlling principle is clear: preliminary findings of fact and conclusions of law are far from final. Litigants rely on such determinations at their peril, and the district court here would have *erred* had it found that its interim plan insulated the districts utilized in that plan from further review—that is, if it *had* done what Texas now says it *should have* done. That the Texas Legislature took account of the interim plan in 2013 when it drew Plan H358 may bear on the Legislature's intent at that time, but the existence of the plan cannot be a magic bullet that wins the case for the State or erases the intent that actually underlay the 201 plan..

C. Interim court approval of districts created with a discriminatory purpose does not launder out the discrimination when those same districts are re-enacted.

Texas also makes a closely related argument from the district court's promulgation of the interim plan. As Texas tells the story, the court blessed the districts challenged here, in the process laundering out the discriminatory intent of the 2011 Legislature. The Legislature's adoption of the interim plan, the story continues, then effectively became implementation of a benign court-ordered plan rather than reenactment of a discriminatory one. Texas Br. 36 (arguing that 2013 plan adopted simply to "bring existing litigation to an end"); see U.S. Br. 41. But this story is a tall tale. Texas's purported reliance on the district court's blessing cannot end the inquiry; the Legislature's *actual* intent remains subject to inquiry.

That determination "demands a sensitive inquiry into * * * circumstantial and direct evidence of intent." *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). It has long been understood that evidence a court may consider in assessing legislative intent includes such considerations as (1) any disparate impact on the protected class; (2) "[t]he historical background of the decision * * * particularly if it reveals a series of official actions taken for invidious purposes"; (3) "[t]he specific sequence of events leading up to the challenged decision"; and (4) the "legislative or administrative history." *Id.* at 266-268 (citations omitted). And a closer "examination of the legislative scheme and its history demonstrates" that Texas's motive in enacting the 2013 redistricting maps was, in fact, to

disadvantage minority voters. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975).[12]

1. Texas's real motive was to re-enact the discriminatory 2011 maps.

In characterizing the legislative motive, Texas's central argument appears to be that, in re-enacting the district court's interim plan, the Texas Legislature's intent was simply to adopt a court-approved plan as a way to end the redistricting litigation, thus rendering irrelevant the 2011 plan (and the associated finding of improper motive). But the State's assertion of this anodyne intent cannot be the end of the story.

As the Court has held, "the mere recitation of a benign[] * * * purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Wiesenfeld*, 420 U.S. at 648. That the Texas Legislature chose to

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[12] Even accepting the State's counter-factual premise that Texas simply implemented a court-ordered plan in 2013 would not end the inquiry. Court-ordered plans may themselves violate the Constitution or the Voting Rights Act. See, *e.g.*, *Connor* v. *Finch*, 431 U.S. 407 (1977) (overturning a court-ordered reapportionment plan for failing to meet "one-person, one vote"); *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975) (same). And when a legislature adopts a court's plan, the plan is still subject to substantive review. For example, under the Voting Rights Act, "[e]ven in the[] cases" where a court orders a plan, "if the governmental body subsequently adopts a plan patterned after the court's plan, Section 5 review would be required." See *McDaniel* v. *Sanchez*, 452 U.S. 130, 149 (1981). Whenever a legislature "submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them," substantive review is available. *Id.* at 153.

include in its permanent plan districts that the district court had approved for interim use says nothing about the Legislature's *actual* motive in making that choice; as with any statute, the 2013 redistricting plan is subject to examination under the ordinary standards used to determine legislative intent. See U.S. Br. 25 (citing *Hunt* v. *Cromartie*, 526 U.S. 541, 549 (1999)). Here, that inquiry leaves no doubt that Texas's real motive in 2013 was not to codify the 2012 interim plans or to avoid litigation; it was to leave the discriminatory 2011 maps in place.

By asking the Court to completely disregard the 2011 redistricting maps, Texas seeks to have its intent evaluated "only from the latest news about the last in a series of governmental actions." *McCreary Cty.* v. *ACLU*, 545 U.S. 844, 866 (2005). "But," as the Court has stated, "the world is not made brand new every morning." *Ibid.* In arguing to the contrary, Texas is "simply asking [the Court] to ignore perfectly probative evidence." *Ibid.* In assessing legislative purpose, however, the Court is not "an absentminded objective observer," but one "presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *Ibid.*

In fact, the 2011 plans remain relevant to the determining the intent of the 2013 Legislature—and powerfully demonstrate improper legislative intent in 2013—for several reasons.

First, under fundamental principles of statutory interpretation, courts presume that legislatures are aware of past legislative and judicial actions. Of particular relevance to this case,[13] a legislature "is pre-

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[13] Courts also presume that legislatures are aware of other substantially similar statutes, see, *e.g.*, *Lockhart* v. *United*

sumed to be aware of * * * [a] judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). Here, the Texas district court held that the Texas Legislature adopted the 2011 plan with a discriminatory purpose. And in 2012, even after the Texas court adopted its interim plan, the District Court of the District of Columbia held that the 2011 Texas congressional redistricting plan had been adopted with a discriminatory purpose and suggested in the strongest terms that the Texas House plan had been as well. *Texas* v. *United States*, 887 F. Supp.2d 133, 159-166, 177-178 (D.D.C. 2012) (noting, regarding House plan, that "the full record strongly suggest[s]" that the retrogressive effect "may not have been accidental"), vacated and remanded, 570 U.S. 928 (2013). Yet the Texas Legislature, aware of the holding that specific line-drawing decisions had been taken for discriminatory purposes, left those same lines in place in 2013. This failure of Texas to alter the 2011 maps "following a contemporaneous and practical interpretation" that they were racially discriminatory "is evidence of an intent to adopt such interpretation." 2B *Sutherland Statutes and Statutory Construction* § 49:9 (7th ed. 2017).

Second, Texas claims that the court below "confuses discriminatory *effect*, which at least is capable of being carried over from one law to another, with discriminatory *intent*, which decidedly is not." Texas Br. 17. But it is Texas that is confused. The argument here is not that the 2011 Legislature's intent

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States, 136 S. Ct. 958, 964 (2016); the common law, see, *e.g.*, *Smith* v. *Wade*, 461 U.S. 30, 34 (1983); and longstanding agency interpretations of statutes, see, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000).

was copied and pasted into to the 2013 legislation; it is that actors typically mean to accomplish the obvious and probable consequences of their actions, as Texas did when it left unchanged the discriminatory districts drawn by the Legislature in 2011. And "given an initially tainted policy, it is eminently reasonable to make the State bear the risk of nonpersuasion with respect to intent at some future time, both because the State has created the dispute through its own unlawful conduct * * * and because discriminatory intent does tend to persist through time." *United States* v. *Fordice*, 505 U.S. 717, 746-747 (1992) (Thomas, J., concurring). That is particularly so given the lengthy history of redistricting violations in Texas, which should lead a court to view Texas's current protestations of innocence with a jaundiced eye: In every redistricting cycle since 1970, this Court has found that Texas violated the VRA with racially gerrymandered districts. See *LULAC* v. *Perry*, 548 U.S. 399 (2006); *Bush* v. *Vera*, 517 U.S. 952 (1996); *Upham* v. *Seamon*, 456 U.S. 37 (1982); *White* v. *Weiser*, 412 U.S. 783 (1973); *White* v. *Regester*, 412 U.S. 755 (1973).[14]

Third, the State argues that any "claims against Texas's 2011 redistricting plans became moot when the 2013 Legislature repealed the 2011 plan." Texas Br. 42 (internal quotation marks omitted). But this,

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[14] Texas had the second highest number of VRA Section 5 objections of any covered state. See Department of Justice, *Voting Determination Letters for Texas*, perma.cc/3CK4-KDKB. In at least 54 instances, Texas withdrew a proposed voting change after it became clear that it would not be pre-cleared. See Nina Perales, Luis Figueroa & Criselda G. Rivas, *Voting Rights in Texas: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 713, 714 (2008).

again, is an exercise in misdirection. The claim here is not that the district court retained the power to enter judgment on the merits of the 2011 redistricting plans; it is that the discriminatory intent of the 2011 plans remains relevant in assessing the validity of identical portions of the 2013 plans.

Fourth, even if it assumed that ending the litigation was *one* of Texas's motives,[15] that is not the end of the matter. Appellees need not "prove that the challenged action rested *solely* on [a] racially discriminatory purpose[]," or even that it "was the 'dominant' or 'primary' one." *Village of Arlington Heights*, 429 U.S. at 265 (emphasis added). Instead, a redistricting plan violates the Equal Protection Clause if racial discrimination was *a* motivating factor. And here, any hope that Texas entertained of ending this litigation by adopting the district court's interim plan was incidental to the Legislature's larger (and closely related) goal of insulating from further challenge maps that discriminated against Latino voters.

Fifth, and perhaps most notably, the district court *in fact* found that Plan H358 was enacted with a discriminatory purpose. Appellees recount the district court's findings in detail, showing that the Texas Legislature not only made no attempt to cure what the district court previously had found to be

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[15] And that is a dubious assumption; the district court found that the Texas Legislature "did not believe that passing the interim maps would end the litigation." H.J.S. App. 358a n.45. Rather, the Legislature knew that the "Plaintiffs would continue to pursue relief" as they had against the identical districts in Plan H283. *Ibid.* In fact, the court found that Texas Legislative Council Attorney Jeff Archer informed the legislators that "they had not realistically removed legal challenges to the plans apart from those areas remedied by the interim plans." *Ibid.*

discriminatory line-drawing, but "purposefully maintained the intentional discrimination contained in Plan H283" (H.J.S. App. 6a); that "the 2013 Legislature intended to continue the intentional discrimination found in Plan H283" (*id.* at 22a); that the Legislature in fact "intended any such taint to be maintained but be safe from remedy" (*id.* at 359a); and that the legislature acted with a strategy that was "discriminatory at its heart." *Ibid.* As appellees also show, this finding is reviewed under a highly deferential standard. Appellees' Br. 41-43. That finding is amply supported by the record and bolstered by the governing legal principles. It should be affirmed.

2. Texas had an affirmative duty to remove the taint of racial discrimination.

Finally, once a court determines that a state actor has engaged in purposeful discrimination, the "racial discrimination [must] be eliminated root and branch." *Green* v. *County Sch. Bd.*, 391 U.S. 430, 437-438 (1968). The proper remedy for an unconstitutional exclusion aims to "eliminate so far as possible the discriminatory effects of the past *and to bar like discrimination in the future.*" *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) (emphasis added) (internal quotation marks and brackets omitted).

Once the district court found racial discrimination in the 2011 maps, the Texas Legislature was obligated to remove the discriminatory taint before enacting new maps. Texas contends that the imposition of this requirement "reverse[s] the burden of proof entirely." Texas Br. 31. But that is not so. We agree that the ultimate burden of proof remains on the plaintiffs. But to return to Justice Thomas's observation, in these circumstances "it is eminently reasonable to make the State bear the risk of nonpersua-

sion." *Fordice*, 505 U.S. at 746-747 (Thomas, J., concurring) (citations omitted). Whether or not the standard is formulated "in terms of a burden shift with respect to intent," the factors the Court "do[es] consider—the historical background of the policy, the degree of its adverse impact, and the plausibility of any justification asserted in its defense—are precisely those factors that go into determining intent under *Washington* v. *Davis*, 426 U.S. 229 (1976)." *Id.* at 747.

Here, the Texas Legislature "does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior" discriminatory legislation. *Fordice*, 505 U.S. at 728. But Texas has not "completely abandoned its prior [discriminatory] system." *Id.* at 729. Instead, "the State perpetuate[d] policies and practices traceable to its prior system that continue to have [discriminatory] effects," "run[ning] afoul of the Equal Protection Clause." *Id.* at 732. Cf. *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 208 (1973) ("[A] finding of intentionally segregative school board actions" in one portion of the school system "creates a presumption" that other actions have the same intent.).

The common sense of the matter is not really debatable. In 2011, the Texas Legislature drew maps for the purpose of discriminating. Two years later, when given an opportunity to remedy this wrong, many of the same legislators, guided by the same legislative leadership, put in place *identical* maps that will have the *same* discriminatory effect. In this context, the contention that discriminatory intent has somehow fallen out of the case is, to quote Texas, "every bit as implausible as it sounds." Texas Br. 1.

CONCLUSION

If the Court does not dismiss the case for lack of jurisdiction, as appellees urge, it should affirm the judgment of the district court.

Respectfully submitted.

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[16] The representation of *amici* by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

Nos. 17-586, 626

In the Supreme Court of the United States

GREG ABBOTT, Governor of Texas, *et al.*,
Appellants,

v.

SHANNON PEREZ, *et al.*,
Appellees.

On Appeal to the United States District Court for the Western District of Texas

BRIEF FOR LOUISIANA, ALABAMA, MISSOURI, OHIO, SOUTH CAROLINA, AND WISCONSIN AS *AMICI CURIAE* SUPPORTING APPELLANTS

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STATEMENT OF INTEREST

Amici curiae are the States of Louisiana, Alabama, Missouri, Ohio, South Carolina, and Wisconsin. The States have a vital interest in the law regarding redistricting, since redistricting is inherently a State function, and each of the States have an interest in holding free and fair elections in an efficient manner. The district court's ruling, challenging the sovereignty of States to hold their own elections and destabilizing elections throughout the State of Texas, has widespread implications for States entering the 2018 election cycle and the coming 2020 redistricting cycle, potentially injecting chaos into the democratic system in all States. Additionally, the district court's ruling undermines the ability of States to rely in good faith on the plain language of a district court opinion.[1]

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, nor made a monetary contribution specifically for the preparation or submission of this brief. The State of Louisiana paid for this brief. *Amicus curiae* files this brief with the written consent of all parties, copies of which are on file in the Clerk's Office. All parties received timely notice of *amicus curiae's* intention to file this brief.

SUMMARY OF ARGUMENT

Appellants have asked this Court, *inter alia*, whether a federal court can find discriminatory intent when adopting a district court's *own remedial plan*. We echo Texas' request that this Court should reverse the lower court's orders that invalidated legally valid reapportionment legislation on multiple grounds. *First*, a state legislature is permitted to rely on economic efficiency and the desire to halt extensive litigation as an appropriate factor when enacting legislation. *Second*, the district court's holding effectively eviscerates long standing principles of state sovereignty. *Third*, the district court issued advisory opinions on the 2011[2] plans because any litigation against the 2011 plans was moot after the 2013 plans were passed.

The district court's decisions below would invalidate decades of precedent from this Court recognizing that States—not unelected judges—have the primary duty of deciding the political question of legislative boundaries, so long as those boundaries comply with the United States Constitution and the Voting Rights Act ("VRA"). States have many responsibilities, only one of which is deciding on the "Times, Places, and Manner of holding elections." *See* U.S. Const. art I, § IV. A State's rational choice to conserve its limited fiscal and temporal resources by enacting a presumptively valid map does not and cannot possibly

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[2] The district court subsequently relied on the 2011 advisory opinions to shift the burden of proof to the State thereby failing to apply the proper test under *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).

create the discriminatory intent the district court below found. The district court goes so far as to hold that the Texas Legislature's level of inquiry and legislative debate as to the merits of the *court* map was insufficient when measured against some unnamed quantitative or qualitative standard. Rather than requiring a State to prove that the district court's *own map* contained no discriminatory intent adverse to the Constitution and the VRA, a federal court should, under this Court's precedents, approach a validly drawn and enacted map with the presumption of constitutionality. In ruling against the 2013 Plan, the district court has flipped the longstanding presumption of validity on its head by assuming that *the court-drawn plan* contains impermissible discriminatory intent. Additionally, the district court ignored the precedent of this Court and of the Fifth Circuit by failing to declare all legal actions against the 2011 plans as moot upon the Texas Legislature's adoption of the court's plan as its own.

ARGUMENT

I. LEGISLATIVE EFFICIENCY IS A VALID REAPPORTIONMENT CONSIDERATION.

A. The Texas Legislature's 2013 Plan Was a Valid Exercise of State Power to End This Dispute.

As described in Appellants' brief, the district court struck down the 2011 Texas Legislature's redistricting plan, holding it violated the VRA. The district court then concluded that a *different* elected body,[3] the 2013 Texas Legislature, possessed a racially discriminatory purpose in violation of § 2 and the Fourteenth Amendment by adopting the *district court's own* redistricting plan. Specifically, the district court stated that the 2013 Legislature "purposefully maintained the intentional discrimination contained in [the 2011 Plan]" because certain districts where the court found violations "remain unchanged or substantially unchanged" in the 2013 Plan. *Perez v. Abbott*, 2017 U.S. Dist. Lexis 136226, *18, 2017 WL 3668115 (W.D. Tex. 2017). The district court reached this conclusion by reasoning that it found certain violations in the 2011 Plan, but the 2013 Legislature failed to pursue sufficient changes to the 2013 Plan beyond what was identified by the district court and ordered to be changed.

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[3] The Texas Legislature meets in regular session only in every odd-numbered year. *See* Tex. Gov't Code § 301.001. By express provision of the Texas Constitution, the legislature meets for only 140 days unless a special session is called. Tex. Const. art. 3, § 24.

The weight of the legislative history in passing the 2013 Plan suggests that the 2013 Legislature focused on fixing the legal infirmities (if any) of the 2011 Plan and acted as it did to efficiently resolve the map-drawing process in good faith reliance on the district court's map. Indeed, in the apparent interest of state policy and efficiency, the Legislature approved the court-ordered plan and went on to its other business. The 2013 Legislature could not possibly achieve its stated goal of avoiding further litigation if it was adopting a plan that is rife with legal infirmities. Surely, a legislature intentionally furthering a pre-existing discriminatory purpose would not be seeking to avoid further litigation. As the United States noted, "[a]n intent to end litigation, without more, is not an intent to discriminate." United States Brief at 41.

The district court's supposition that the Legislature adopted the 2013 Plan as part of a trial strategy and for purposes of efficiency should instead stand *against* not *for* the proposition that the legislature was intentionally furthering an existent purposeful discrimination. In other words, "[w]e doubt that the constitutional line separating the legislative and judicial powers turns on" the "court's doubts about" a legislature's "unexpressed motives." *Cf. Patchak v. Zinke*, 2018 U.S. LEXIS 1515 at *20 (Feb. 27, 2018) (plurality op.). The district court improperly imputed the finding of unlawful intent from the 2011 Plan onto the 2013 Plan, thereby invalidating the court-drawn plans it drew, approved, and ordered enacted. Plainly stated, the 2013 Plans are new plans based on the district court's own 2012 Plans, cleansed of any discriminatory "taint" by the district court's earlier

finding that the 2012 Plans were free from constitutional violations and violations of the VRA.

Indeed, a court-ordered plan is subject to a far higher standard than one drawn by a legislature. *See, e.g.*, *Wise v. Lipscomb*, 437 U.S. 535, 541 (1978) (noting that courts lack "political authoritativeness" and must act "in a manner free from any taint of arbitrariness or discrimination" in drawing remedial districts) (quoting *Connor v. Finch*, 431 U.S. 408, 417 (1977)); *Wyche v. Madison Par. Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts."); *Wyche v. Madison Par. Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981) (noting that "a court is forbidden to take into account the purely political considerations that might be appropriate for legislative bodies"); *Favors v. Cuomo*, Docket No. 11–cv–5632, 2012 WL 928216, at *18 (E.D.N.Y. Mar. 12, 2012), *report and recommendation adopted as modified*, No. 11-cv-5632, 2012 WL 928223, at *6 (E.D.N.Y. Mar. 19, 2012); *Molina v. Cty. of Orange*, No. 13CV3018, 2013 WL 3039589, at *8 (S.D.N.Y. June 3, 2013), *supplemented*, No. 13CV3018, 2013 WL 3039741 (S.D.N.Y. June 13, 2013), *report and recommendation adopted*, No. 13 CIV. 3018 ER, 2013 WL 3009716 (S.D.N.Y. June 14, 2013); *Larios v. Cox*, 306 F. Supp. 2d 1214, 1218 (N.D. Ga. 2004); *Balderas v. Texas*, No. 6:01CV158, 2001 WL 36403750, at *4 (E.D. Tex. Nov. 14, 2001). The fact that the 2013 Plans may share some lines with the 2011 Plans is of no legal significance because the district court adopted those lines as its own and, in doing so, made clear that the plan complied with the VRA and the Constitution. In

fact, the district court was required to ensure that its plans were compliant with both the VRA and the Constitution as instructed by this Court. *See Perry v. Perez*, 565 U.S. 388, 393 (2012).

B. Boundless Litigation, Despite the Clear Validity of Texas' Adoption of the Court-Ordered Plans, has an Inherently Destabilizing Effect on Elections at Great Expense to Taxpayers.

Free and fair elections is a foundational tenet of democracy and this objective must be pursued to a satisfactory conclusion. However, the prior decisions of this Court dictate that due process requires consideration of distinct factors, including the Government's interest in implementing additional fiscal and administrative burdens. *See Mathews v. Eldridge*, 424 U.S. 335 (1976). Texas has been required to expend tremendous taxpayer resources in pursuit of this litigation, including for the half-decade since the 2013 Legislature sought to remedy constitutional and VRA deficiencies by passing a court-ordered map. The 2013 Legislature considered that map to be free of any leftover "taint" of discrimination, given its imprimatur of acceptability issued expressly by the district court.

This Court should now recognize that the time for redundant and destabilizing litigation over this map has ended, and the voters of Texas should be able to rely on the determination of their representatives and the courts. For seven years now, the citizens of every Texas legislative and congressional district have had little certainty as to who would continue to represent them, or whether a different representative would represent their interests. The effect of that uncertainty

is destabilizes the election process in the State, with the potential for similar situations across the country. Despite the presence of clear guidance from this Court regarding the requirements of the VRA—and importantly, that the law does *not* require a state to engage in seemingly boundless litigation over moot plans—a single lower court has thrown into further chaos the long-pending Texas legislative redistricting process. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017) (describing the review process for a district under the VRA).

If the district court is allowed to impute the intent of the 2011 Legislature when enacting the 2011 Plans onto a different Legislature altogether when enacting the court-ordered 2013 Plans, the potential ramifications will flow well beyond this case. Taken literally, the district court's holding means that any prior legislation found impermissible by a court could never be cured by a subsequent legislature. Such a result is nonsensical. Indeed, in this case, the district court relies on the fact that the 2013 Legislature enacted the court-ordered plans, which were redrawn to avoid a discriminatory purpose, to hold that the 2013 Legislature acted with discriminatory purpose. If this circular logic stands, it will work extreme unfairness to State litigants by calling into question the finality of judgments. States will be unable to be sure if court orders are valid or reliable and therefore may only adopt them at the risk of years of ongoing litigation. Moreover, such reasoning could require similarly situated legislatures to scrap existing maps and redraw all of their electoral districts. A comprehensive redraw would occur at enormous cost to taxpayers, would further destabilize the bond between a representative

and her constituent, and would slow the legislative process to an unnecessary crawl.[4]

II. The District Court's Holdings Eviscerate Principles of State Sovereignty.

A. The District Court Was Wrong to Impose Upon the Texas Legislature Any Modifications to its Constitutional Deliberative Process.

The District Court erred by imposing a new extra-constitutional requirement on the Texas Legislature when it required a sufficiently robust deliberative process. *See Perez v. Abbott*, 2017 U.S. Dist. LEXIS 129982, *49-50 (Aug. 15, 2017) ("[T]he Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans."). First, no such deliberative process is required by federal or Texas state law. Second, assuming *arguendo* that such a process is required, the Texas Legislature fulfilled the requirement by enacting the district courts map.

As explained more fully *infra*, when reviewing a lawfully enacted statute by a state legislature, the court must start from a position of presumed constitutionality, rather than suspicion. *See Miller v.*

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[4] Nothing in this brief should be read to advance an argument that constitutional deficiencies in a law should be ignored in favor of cost considerations. Rather, a State should be able to presume reliance on a decision of district court expressly charged with drawing a map designed to cure constitutional and VRA issues. Without such reliance, the likely outcome is endless litigation in pursuit of endlessly moving goalposts.

Johnson, 515 U.S. 900, 916 (1995). Here, the district court failed to give deference to the legislature or binding precedent. In fact, the district court, at every turn, seemed to presume ill intent on behalf of the Texas Legislature, which is especially evident by improperly carrying over claims and evidence against the 2011 Plans to the 2013 Plans. *See Perez v. Abbott*, 2017 U.S. Dist. LEXIS 35012, *19-20 (W.D. Tex. March 10, 2017). *Perez v. Abbott*, 2017 U.S. Dist. LEXIS 129982 (W.D. Tex. Aug. 15, 2017); *Perez v. Abbott*, 250 F. Supp. 3d 123, 226 (W.D. Tex. April 20, 2017) (Smith, CJ dissenting).

The Court cannot impose a deliberative process on a legislature. "The Constitution does not and cannot guarantee that legislators will carefully scrutinize legislation and deliberate before acting. In a democracy it is the electorate that holds the legislators accountable for the wisdom of their choices." *INS v. Chadha*, 462 U.S. 919, 997 (1983) (White, J., dissenting). Some State legislatures can, and do, place floors on their own deliberative processes to ensure a basic level of debate, for instance "three-reading" rules in Massachusetts and Minnesota, and timing provisions related to the introduction of new legislation found in a majority of the states.

For the court to now ignore these principles of self-rule, pierce through inherent differences in the political makeup of diverse sovereign states, and impose judicially-created debate standards would not only be rife with federalism problems but would also be impractical. Such an approach to state legislative procedures would open the floodgates to a new cause of action by which to attack legislative districts,

unsupported by any federal law. *See generally Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16 (1981) (holding that where legislation "imposes congressional power on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority" and refusing to impose mandatory obligations on the States where Congress nowhere stated its intent to do so); *see also Gregory v. Ashcroft*, 501 U.S. 452 (1991) (where congressional intent is ambiguous, Court will not attribute an intent to intrude on State governmental functions). The district court, now, is attempting to supplant the 2013 Texas Legislature's discretion for its own as to what constitutes sufficient deliberation. This is wholly inappropriate.

Fundamentally, the role of the judiciary is to apply the law, not to decide what law and in what manner it would rather have applied it. "The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). No such sensitivity is shown here. Instead, presuming ill intent by adopting the *court's own plan*, the district court placed the plaintiffs' policy choices ahead of those elected for that task.

> [The court's] role is not to determine whether the procedural choices made by the legislature were the best among a range of options, whether the legislative action had to reflect the testimony received at the public hearings, or whether the legislature was required to consider that

> testimony or input during its redistricting deliberations. [The court's] task, instead, is to determine whether the legislature's actions violated federal law."

Martinez v. Bush, 234 F. Supp. 2d 1275, 1298 (S.D. Fla. 2002).

The deference afforded State legislatures does not just apply to the laws they pass but also applies to the process the States adopt to pass laws. On matters of policy and fact-finding generally, this Court has also long extended significant deference to State legislatures. "States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979) and citing *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 425 (1952) and *Henderson Co. v. Thompson*, 300 U.S. 258, 264-65 (1937)). So long as there is "evidence before the legislature reasonably supporting the classification," a duly enacted piece of legislation should not be invalidated even if a challenger could "tender[] evidence in court that the legislature was mistaken" *Id.*; *see also* Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, Faculty Scholarship, Paper 74 (2005), available at http://scholarship.law.upenn.edu/faculty_scholarship/74. Based on the record below the Legislature had ample evidence that (1) the plans fully complied with

all requirements of the Constitution and the VRA; and (2) the legislature, relying on the court's judgment to that effect, enacted the new plans to dispose of future litigation.

A federal court simply cannot impose a one-size-fits-all deliberative requirement on state legislatures. State legislatures vary widely in their rules regarding the deliberation of an action, as well as the amount of time they are in session. Some are full-time, and some are part-time. The Texas Legislature, for instance, only holds a regular session every other year. Some have aggressive policy agendas based on the political turbulence of a given moment, and some have far greater stability due to a multi-term governor or single-party control. Deliberation, by its very nature, cannot even be measured in simplistic objective terms such as days or hours. Imposing some standard for deliberation would be unfounded in federal law or the Constitution and would also be in direct violation of this Court's holdings in *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) in which the Court described a "fundamental principle of equal sovereignty" among the States. The Court, therefore, cannot impose a single set of deliberative requirements on a multitude of sovereign states.

B. Texas' Lawful Legislative Enactments are Deserving of Judicial Deference and a Presumption of Constitutionality.

Drawing districts is "primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993); *see also Shelby Co. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *Perry*,

565 U.S. at 392). Unless reapportionment choices contravene federal requirements, the federal courts are bound to respect the States' apportionment choices because the "States do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law." *Voinovich*, 507 U.S. at 156 (internal citations omitted); *see also* U.S. Const. art I, § IV (delegating the "Times, Places, and Manner of holding Elections" to the State legislatures); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 593 (N.D. Ill. 2011) (refusing to replace a State legislature's enacted plan "with one that . . . advance[s] the objectives of the minority political party at the time of redistricting.").

The district court all but ignored this Court's well-established presumption of good faith accorded to legislative enactments. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). ("the presumption of good faith that must be accorded legislative enactments,") Here, the district court failed to "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race," and instead chose to declare the 2013 Plans unlawful by applying a presumption of invalidity when the Texas Legislature acted on the basis of the district court's own ruling. *See Perez v. Abbott*, 2017 U.S. Dist. LEXIS 35012, at 16 (W.D. Tex. March 10, 2017) (outlining the district court's concern that the legislature had not conceded illegality of the 2011 Plan and there was "no indication that the Legislature would not engage in the same conduct" in the future). The presumption of constitutionality of legislative enactments necessarily means that *plaintiffs*, *not the legislature*, bear the "demanding"

burden of showing impermissible motivation behind the legislative enactment at issue. *Miller,* 515 U.S. at 928 (O'Connor, J. concurring). Despite the district court's analysis showing otherwise, any doubt or failure to carry that burden must be resolved in favor of the State. *Id.* at 916.

The district court eviscerated the presumption of good faith when it decided that the State's action in adopting the court's own plans were unconstitutional. This leaves nothing left of the long-standing presumption of validity afforded to state legislative enactments and usurps one of the most basic political functions of state legislatures. The federal courts have an affirmative duty to always assess the "the intrusive potential of judicial intervention into the legislative realm." *See id. at* 916-17. The district court absolutely failed to do that here.

Needless to say, the potential implications of the district court's actions are enormous. Time and again this Court has held that where legitimate motives exist, government action is presumed valid and a court may not automatically infer an unlawful purpose. *See, e.g., U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (beginning the inquiry by "noting the heavy presumption of constitutionality to which a carefully considered decision of a coequal and representative branch of our Government is entitled."); *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (refraining from inferring discriminatory purpose where the state had legitimate reasons to adopt and maintain capital punishment); *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) (presumption of regularity and proper discharge of official duties absent clear evidence

to the contrary); *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918) (good faith and validity of actions presumed). If the district court's ruling is permitted to stand, there is nothing left to bar the federal judiciary's "serious intrusion on the most vital of local functions," *Miller,* 515 U.S. at 915 (1995), and likewise, nothing left of the mandate that federal courts must "exercise extraordinary caution" in redistricting cases and afford states a presumption of constitutionality and good faith. *Id.* at 916.

What is truly extraordinary is that the district court wholly failed to acknowledge its own reasoning and analysis in support of the validity of the court-drawn plans as a good faith basis for Texas' 2013 enactment. In so doing, the Court repudiates its own findings and the lawfulness of its own order. Even without additional justification, the simple fact is that when the district court entered an order directing Texas to adopt Plan C235 and H358,[5] this order alone constituted a legitimate, good faith basis for the enactment of the legislation. The record lacks any basis on which to infer that the 2013 Legislature had an improper purpose in adopting the Plans. Under a proper application of this Court's precedent and the presumption of good faith and constitutionality, the District Court's ruling must be overturned.

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[5] It is important to note that while, Plan C235 was adopted wholesale by the Texas Legislature, Plan H358 was slightly modified for a few districts. However, this does not change the fact that the district court completely dismissed its own reasons for adopting the interim plans as well as the Texas Legislature's good faith reliance on those reasons.

The district court erred in two separate and distinct ways as it failed to apply the *Arlington Heights* factors. *See Cooper v. Harris*, 137 S. Ct. 1455, 1479-80 (2017) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (standards offered "a varied and non-exhaustive list of 'subjects' of proper inquiry in determining whether racially discriminatory intent existed'" while also reaffirming that the Court has "often held" the burden of proof on the plaintiff to prove race, not politics, "is demanding." (citations omitted)). Despite the legislature basing its action on the valid remedy of the district court, the district court still faulted it with a finding of discriminatory intent. The historical background of the action, the specific sequence of events leading up to the action, and the legislative history of the action all can be directly traced to the action of the district court itself. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68. A legislature adopting a federal district court plan as its own is hardly a substantive departure from the norm. *See id.*

The *Arlington Heights* framework guides how federal courts should go about finding whether a governmental entity acted with discriminatory purpose. Nowhere within that framework do federal courts have a blank check to arbitrarily find constitutional violations on the sole basis that they disagree with States' chosen policies and internal democratic processes. *Arlington Heights* states that, while the impact of the official action may provide "an important starting point," impact alone "is not determinative and the court must look to other evidence." *Id.* at 266. Particularly, "the specific sequence of events leading up to the challenged

decision also may shed light on the decisionmaker's purposes." *Id.* at 267 (citations omitted). The district court here struck four different State legislative actions, including the extraordinary measure of the Legislature's acquiescence to Plan C235 precisely as drawn by the district court. For the district court, apparently nothing the Texas legislature could do would remedy the alleged violations. If a district court can hold a State legislature acted unconstitutionally in adopting a court-ordered plan, absolutely nothing stops other federal courts from inserting themselves into state deliberative processes and holding States hostage to this type of litigation in perpetuity. The precedent established by the district court, that the judiciary can hold a State in such a damned-if-you-do damned-if-you-don't situation, is a wholly inappropriate overreach by the judiciary into the realm of State sovereign interests. This Court has held that "reapportionment is primarily the duty and responsibility of the State," *Chapman v. Meier*, 420 U.S. 1, 27 (1975), and "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller*, 515 U.S. at 915. The presumption of good faith carries particular weight in the context of redistricting legislation, and yet Texas was plainly not afforded such a presumption. This Court must refuse to allow the district court its exercise of such unlimited discretion, particularly in this case affecting the most vital of state functions, and which profoundly implicate state sovereign interests and their individual citizens' interests in representative democracy.

C. The District Court Should Have Dismissed All Claims Against the 2011 Plans for Lack of Jurisdiction After Those Plans Were Repealed.

A key concern of *amici* is the extraordinary resources litigation of this type will impose upon the States if allowed to stand. Any action against the 2011 Plans should have been moot under long standing principles of Fifth Circuit and this Court's precedent. In point of fact, the claims against those plans ought to have been declared moot by the district court nearly *5 years* ago. By using as its basis plans that were no longer in effect and ignoring basic principles of this Court's mootness doctrine, the parties have been forced to endure years of litigation. This is time and resources that could have obviously been spent on far more productive endeavors.

The federal judiciary is confined to the decision of "Cases" or "Controversies." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997); *see also* U.S. Const. art. III § 2. Specifically, "[m]ootness has been described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue through its existence (mootness).'" *Id.* at n.22 (citing and quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)). Mootness goes to the heart of this Court's subject-matter jurisdiction. *Flast v. Cohen*, 392 U.S. 83, 95 (1968) ("no justiciable controversy is presented...when the question sought to be adjudicated has been mooted by subsequent developments") (footnote omitted). Subject-matter jurisdiction "cannot be forfeited or waived and should

be considered when fairly in doubt." *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009). This Court has "an obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

Plainly, the district court should have respected the Texas Legislatures prerogative to enact new electoral districts by accepting the 2013 Plans as the governing law and therefore moving on to consider *only* the claims against those plans. Two specific instances where the district court erred must be addressed. First, the district court erred by applying the "voluntary cessation" exception to the mootness doctrine to the adoption of the 2013 Plans. Second, the district court failed to heed the ruling of the Fifth Circuit in *Davis* that resulted in another Texas 2011 redistricting plan case becoming moot due to the exact same facts.

D. The Voluntary Cessation Doctrine is a Very Limited Exception that was Misapplied by the District Court to the Adoption of the 2013 Plans.

In general, "[s]uits regarding the constitutionality of statutes become moot once the statute is repealed." *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004); *see also Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412, 414-15 (1972). Put another way, in the context of mootness, the courts are to review a "statute as it now stands, not as it once did." *Hall v. Beals*, 396 U.S. 45, 48 (1969); *see also e.g. Thorpe v. Housing Authority*, 393 U.S. 268, 281-282 (1969). There are several limited

exceptions to the mootness doctrine, one of which is the voluntary cessation exception. It was this exception the district court relied upon when denying the original motion to dismiss this action as moot. *See Perez v. Perry*, 26 F. Supp. 3d 612 (2014).

The voluntary cessation exception to the mootness doctrine arises when "there is evidence . . . that the state will reenact the statute or one that is substantially similar." *Id.*; *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). The mere ability of the State legislature to reenact a statute after the lawsuit is dismissed is not enough to satisfy the exception. *See Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006). Typically, the exception applies only in "situations where it is virtually certain that the repealed law will be reenacted." *Id.* Essentially, the exception is a rule out of necessity, to avoid that rare instance where the legislature is intent on avoiding judicial review with the clear intent to reinstate the challenged law.

This was the precise issue the Court was faced with in *Aladdin's Castle*. In that case, this Court found that the "voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" when the jurisdiction is "not precluded from reenacting precisely that same provision." *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982). It is not simply the *possibility* that the challenged statute may be reenacted; rather the relevant inquiry is an evaluation of "the likelihood that the challenged action will recur." *Id.* at 296 (White, J. concurring in part and dissenting in part); *see also Id.* at 289. In *Aladdin's Castle*, the jurisdiction

in question intended to reenact the repealed language upon vacatur of the district court's judgment. *Id.* at 289, n.11. In this context, the voluntary cessation exception is simply a species of the capability-of repetition-but-evading-review exception.

Given the general contours of the exception, it plainly applied to the adoption of the 2013 Plans.

The 2011 Plans were adopted over six years ago and were enjoined shortly thereafter. *Perez v. Abbott*, 2017 U.S. Dist. LEXIS 35012, at 249. The district court, having found constitutional violations, drew interim plans. *Id.* Meanwhile, parallel litigation was pending over Section 5 preclearance under the VRA for the original 2011 Plans. After this Court's holding in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), Texas repealed the 2011 Plans and adopted the district court's remedial plans. *See Perez v. Abbott*, 2017 U.S. Dist. LEXIS 35012, at 250 (W.D. Tex. March 10, 2017) (Smith, J. dissenting). The new Plans were subsequently signed into law by then-Governor Rick Perry. *Id.* Texas has operated under the 2013 Plans for the last three election cycles. There is no evidence Texas was engaged in some sort of legislative attempt to subvert the litigation or the district court in some effort to *re-adopt* the 2011 Plans. Instead, the majority of the district court refused to moot this case because, *inter alia*, "[1] there is no indication that the Legislature would not engage in the same conduct that Plaintiffs assert violated their rights in upcoming redistricting cycles; [and 2] because Texas refused to concede the illegality of any conduct, a dispute remains over the legality of the challenged practices and there is no assurance that the conduct will not recur . . . ." *Id.*

at 16. This impermissibly shifts the burden to the legislature to prove its actions were not illegal, which is of course contrary to the great weight of this Court's precedent.

Furthermore, the district court had clear evidence of mootness for any action against the 2011 Plans. During the pendency of this action, the United States Court of Appeals for the Fifth Circuit effectively held that the "claims involving the 2011 Texas Senate plan were moot" and in so doing overwhelmingly indicated that the remainder of lawsuits pending on the various 2011 Plans were also moot. *See Perez v. Abbott*, 2017 U.S. Dist. LEXIS 35012, at 249-51 (W.D. Tex. March 10, 2017) (Smith, CJ. dissenting); *Davis v. Abbott*, 781 F.3d 207 (5th Cir. 2015). As noted by the Judge Smith's dissent, "[a] precedential decision by a circuit court binds all district courts in the circuit. That command is absolute." *Perez v. Abbott*, 2017 U.S. Dist. LEXIS 35012, at 249-51 (W.D. Tex. March 10, 2017) (Smith, J. dissenting).

Finally, a newly released decision of this Court further buttresses the position that any proceeding addressing the 2011 plans should be dismissed as moot. As a plurality of this Court recently stated in *Patchak*: "Under this Court's precedents, Congress has the power to 'apply newly enacted, outcome-altering legislation in pending civil cases,' even when the legislation governs one or a very small number of specific subjects." *Patchak*, 2018 U.S. LEXIS 1515 (Feb. 27, 2018) (citing and quoting *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1325 (2016)) (internal alterations and cross citations omitted).

As a preliminary matter, the Constitution's Elections Clause provides that "[t]he Times, Places and Manner" of congressional elections "shall be prescribed in each State by the Legislature thereof" unless "Congress" should "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. The Elections Clause vests authority over congressional elections in the State legislature and Congress. There is no express grant of authority given to the federal courts. While, *Patchak* specifically addresses Congress' power to moot pending litigation, similar reasoning applies here, especially when a State legislature is acting under an express grant of authority from the United States Constitution. *See* U.S. Const. art. I, § IV. *Patchak* further implies that the voluntary cessation exception does not apply to legislative enactments that moot litigation outside exceptional circumstances not found here.

Any and all actions against the 2011 Plans were mooted by the actions of the Texas Legislature when it adopted the court-ordered plans as its own. Any reliance on finding of improper purpose or discriminatory intent carried over from those plans was improper and should have been wholly disregarded by the district court.

CONCLUSION

States cannot efficiently hold free and fair elections where a district court can issue an order, cause states and voters to act in reliance on that order, and then simply change its mind on the eve of a deadline to redraw district maps for the 2018 elections. Such actions result in tremendous cost and have destabilizing consequences for the States. Moreover, the district court's arbitrary approach to the Texas

Legislature's actions disregards the deference afforded States on this fundamental question of State sovereignty. Accordingly, *amicus curiae* respectfully urge this Court to reverse the district court's orders that would invalidate districts in the 2013 Plan.

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